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CHARLES ELMORE CROPLEY

No. 23

In the Supreme Court of the United States

OCTOBER TERM, 1946

TAZE HAMRICK GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES ON REARGUMENT

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OPINION BELOW

The opinion of the circuit court of appeals (R. 93–95) is reported at 149 F. 2d 751. The findings of fact of the trial court are set forth at R. 20–22.

JURISDICTION

The judgment of the circuit court of appeals was entered June 15, 1945 (R. 96). The petition for a writ of certiorari was filed on July 13, 1945, and was granted on October 22, 1945 (R. 101). The case was argued before this Court on January 2, 1946, and on February 25, 1946, the Court entered an order restoring the case to the docket

for reargument before a full bench. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioner was accepted at the Civilian Public Service Camp to which he reported.

2. If so, whether his acceptance bars the defense of alleged improper classification.

3. If the defense is not barred, did the admissible proof offered by petitioner show that there is no foundation in the facts before the board of appeal for its refusal to classify him as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940 are set forth in Appendix A, *infra*, pp. 57–61. The pertinent Selective Service Regulations are set forth in Appendix B, *infra*, pp. 62–74.

STATEMENT

Petitioner was indicted (R. 2–3)[1] in the United States District Court for the District of South

[1] The designation "R." refers to the printed record, and the designation "Ex." to the volume of original exhibits which is also before the Court.

Dakota in one count charging a violation of Section 11 of the Selective Training and Service Act. The indictment alleged that pursuant to petitioner's claim that he is conscientiously opposed to both combatant and non-combatant training and service, he was classified IV–E and assigned to a Civilian Public Service Camp; that he reported to the camp and was duly enrolled in it; and that on August 28, 1944, he unlawfully deserted from the camp.

Petitioner waived a jury trial (R. 29). He made no effort at the trial to dispute the facts adduced by the Government showing his desertion from the Civilian Public Service Camp. Instead, he sought to show as a defense that he is a minister of religion and that the selective service boards arbitrarily denied his claim to classification as a minister. This defense was rejected (R. 48–59, 66–69), petitioner was found guilty (R. 23–24), and he was sentenced to imprisonment for five years (R. 24–25). The trial judge found as a fact (R. 21–22) that after having been classified IV–E and having been assigned to Civilian Public Service Camp No. 57, petitioner reported to the camp as he was directed by his local board; that he was enrolled in the camp on or about August 23, 1944; that he was given a "pre-induction medical examination, which examination showed him fit for * * * service"; and that on August 28, 1944, petifioner deserted from the

camp in violation of Section 653.12 of the Selective Service Regulations.

Upon appeal to the Circuit Court of Appeals for the Eighth Circuit, the judgment was affirmed (R. 96).

The facts bearing on the issue of the lawfulness of petitioner's selective service classification are summarized in the Argument, pp. 45–49, *infra*. The other evidence at the trial may be summarized as follows:

At the outset of the trial, the parties stipulated (R. 30) that "this defendant, now on trial, was born in Meridian, Mississippi, on the 14th of September, 1922. He is now 22 years of age. He registered in September, 1942, with Local Board A, Union County, Eldorado, Arkansas. Immediately following his registration a selective service questionnaire was sent to him, on October 5, 1942. The questionnaire was returned to the local board on October 12, 1942. In that questionnaire he claimed to be a minister of religion, a minister of Jehovah Witnesses. On November 6, 1942, the local board classified him 1A. From that classification and on November 12, 1942, he appealed to the State Board of Appeal, which board classified him 4E. He was so notified. Other proceedings were had but the 4E classification was continued, and still remains. Acting on that classification, General Hershey, Director of the Selective Service System, on May 23, 1944, made an order, directed to the State Director of Illinois, to

whose jurisdiction the case of Taze Hamrick Gibson had been transferred by the board at Eldorado, Arkansas, assigning this defendant to Civilian Public Service Camp No. 57, at Hill City, Pennington County, South Dakota, and ordering that the proper local board make the necessary order to the defendant to report for work of national importance. The order to this defendant accordingly was made on August 8, 1944, ordering him to appear and report at the camp on August 21, 1944. He reported at the camp pursuant to that order, and was there enrolled on or about August 23, 1944."

It was established by other evidence that during the next five days petitioner underwent the usual conditioning period for all enrollees (R. 35; see Ex. 23). On August 28 he was given the routine examination by the camp doctor and was found to be physically fit (R. 38, 70; Ex. 22). On the same day, petitioner handed the camp director a letter (R. 38; Ex. 26–27) stating, *inter alia*, that he was a minister of religion and that he therefore refused to perform work at the camp. In an interview with the camp director petitioner explained to him that he had reported to the camp "only to exhaust the administrative process" (R. 75). The Camp Director advised him that the Selective Service Regulations required him to remain at the camp and that if he did not do so, he would be prosecuted and would be sent to

prison (R. 39, 74). Despite this admonition, petitioner left the camp on August 28, and he did not return (R. 39, 77). In a subsequent statement to an F. B. I. agent, petitioner stated that he left the camp and that he understood that by his conduct he was violating the Selective Service Regulations (R. 46).

SUMMARY OF ARGUMENT

I. There was no dispute in the lower courts concerning the question of petitioner's acceptance by the Civilian Public Service Camp, and the parties are agreed in this Court that petitioner was accepted by the camp on August 23, 1944, the day on which he reported to the camp.

II. Petitioner's acceptance bars the defense of alleged improper classification. The Selective Service Regulations (sec. 653.12; see also secs. 652.11 (a), 691.17) impose on every person classified IV–E and assigned to a Civilian Public Service Camp the unqualified duty to remain in the camp and perform work of national importance until he is lawfully released from the camp. The duty extends as well as to a registrant who believes himself misclassified as it does to all others at the camp. The policy underlying the regulations contemplates that a member of a Civilian Public Service Camp may undertake to challenge his selective service classification either by seeking administrative relief through the Director of Selective Service or by resorting to

habeas corpus, but that he may not defy the Act and regulations. Its objective plainly is to require a registrant to proceed in an orderly manner and to avoid placing him in a position, such as petitioner's, whereby if his challenge is unsuccessful he must be sent to prison as a convicted felon.

As we show in the Argument, the policy of the regulations that a registrant may not defy the camp authorities because he is not satisfied with his classification is neither novel nor of substantial prejudice to petitioner. Having wilfully refused to perform the duties imposed upon him by the regulations, petitioner may not excuse that failure by urging that the duties ought not to have been imposed upon him. Until he was lawfully relieved of his duties, it was his obligation to perform them.

III. Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed on the ground that the information contained in petitioner's selective service file, which he offered in evidence, plainly shows that there was foundation in the facts before the boards for rejecting petitioner's claim to classification as a minister. The file, which is before the Court, shows that notwithstanding the fact that petitioner informed his local board in October 1942 that he had been a

full-time minister since 1940, the Watchtower Society on January 8, 1942 requested the Director of Selective Service to remove petitioner's name from the list of ministers recognized by the Society. Because petitioner's name was removed from the list the local board refused to classify him IV–D. After petitioner was classified IV–E by the board of appeal, petitioner admitted to the local board that in the fall of 1941 he had not been a full-time minister. He claimed that he had since returned to the ministry, but he furnished nothing from the Watchtower Society showing that he was again recognized by the Society as a minister of religion. Bearing in mind the admitted falsity of petitioner's original statement to the board that he had been a full-time minister from 1940 to October 1942 when he registered, the action of the Watchtower Society in affirmatively withdrawing its recognition of petitioner as a minister, and the absence of evidence, other than petitioner's assertion, that petitioner was subsequently restored to status as a minister of religion by the Society, we think there was ample basis in fact for the boards' rejection of petitioner's claim.

ARGUMENT

This brief is submitted in response to the order of this Court on February 25, 1946, restoring the

case to the docket for reargument before a full bench and providing that

> On reargument special attention is directed to the question whether petitioner was accepted by the Civilian Public Service Camp and, if so, whether his acceptance bars the defense of the alleged improper classification.

I

PETITIONER WAS ACCEPTED BY THE CIVILIAN PUBLIC SERVICE CAMP TO WHICH HE REPORTED

Introductory.—Section 5 (g) of the Selective Training and Service Act (*infra*, pp. 57–58) exempts from the obligation to perform military service all registrants found to be conscientiously opposed to both combatant and noncombatant military service, and it provides that "any such person claiming such exemption" shall, in lieu of induction into the armed forces, "be assigned to work of national importance under civilian direction." The Act does not create a Civilian Public Service Camp System but, instead, leaves the execution of the congressional policy to the President (sec. 5 (g)). And, it is to be noted, it contains no provisions relating to an induction procedure by which such persons are inducted for work of national importance, in contrast to the Bone Amendment in Section 11, which provides that a selectee shall not be subject to trial by a military tribunal until he has submitted to induction (see *Billings* v.

Truesdell, 321 U. S. 542). The Civilian Public Service Camp System has been established by the Director of Selective Service (see Reg. 653.1–653.2) in the exercise, as the delegatee of the President (*infra*, pp. 81–82), of the power conferred on the President by Section 10 (a) (1) of the Act "to prescribe the necessary rules and regulations to carry out the provisions" of the Act and the power conferred by Section 10 (a) (2) to create such agencies as are necessary to the administration of the Act.[2] And the rights and duties of persons assigned to such camps are defined by the regulations promulgated by the director, regulations which have the force of law. *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 484.[3]

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[2] See, concerning the establishment of the camps, their functions, their membership, etc., the annual reports of the Director of Selective Service. *Selective Service in Peacetime*, 1940–1941, pp. 185–201; *Selective Service in Wartime*, 1941–1942, pp. 252–272; *Selective Service as the Tide of War Turns*, 1943–1944, pp. 177–199.

[3] Attacks on the Civilian Public Service Camp System as being in violation of the Fifth and Thirteenth Amendments and as being unauthorized by the Selective Training and Service Act have been uniformly unsuccessful. *Roodenko* v. *United States*, 147 F. 2d 752 (C. C. A. 10), certiorari denied, 324 U. S. 860; *Kramer* v. *United States*, 147 F. 2d 756 (C. C. A. 6), certiorari denied, 324 U. S. 878; *Brooks* v. *United States*, 147 F. 2d 134 (C. C. A. 2), certiorari denied, 324 U. S. 878; *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, 325 U. S. 881; see also the Briefs for the United States in Opposition in *Gormly* v. *United States*, No. 220, October Term, 1943; *Kramer* v. *United States*, No. 1034, October Term, 1944; *Roodenko* v. *United States*, No. 947, October Term, 1944.

The Selective Service Procedure.—The procedural steps by which a registrant's status changes from that of a selectee to that of a "campee" differ in some respects from the procedure involved where the registrant is classified for military service, and the procedure differs in some respects from that which prevailed at the time of *Falbo's* case (320 U. S. 549) in respect of persons assigned to work of national importance. In order that the facts of this case may be viewed in their proper setting, it may be helpful to consider generally the procedure involved before turning to the facts.

If a registrant is classified IV–E (conscientious objector to both combatant and noncombatant military service), the procedure by which he becomes a member of a Civilian Public Service Camp, as it existed when petitioner was ordered to report, is as follows: When the registrant's order number is reached in the process of selecting registrants to report for induction into the armed forces, he is summoned for a final-type preinduction physical examination in the same manner as that conducted for men selected for military service (Reg. 629.1–629.2).[4] If the report of the examination indicates that he is physically and mentally qualified for service, he is issued a Certificate of Fitness (Reg. 629.32). It is after this point that the procedure

[4] The text of each of the provisions of the Selective Service Regulations to which reference is made is set forth in Appendix B, *infra*, pp. 62–74).

relating to a registrant classified IV–E differs from that relating to a registrant classified I–A. In the case of the latter, the local board thereafter orders him to report for induction. When he reports to the local board, he is transported to the induction station where he is again physically examined, and, if he is found acceptable, he undergoes the induction ceremony (see *Estep* v. *United States,* Nos. 292 and 66, decided February 4, 1946).

In the case of a registrant classified IV–E, when he receives his certificate of fitness, his final acceptability has been ascertained. Thereafter, he is assigned to a Civilian Public Service Camp by the Director of Selective Service (Reg. 652.1–652.2). The local board then issues its Order to Report for Work of National Importance, at which point it becomes the registrant's duty "to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law" (Reg. 652.11). As soon as the registrant leaves his local board en route to the camp, he is "under the jurisdiction of the camp to which he is assigned" (Reg. 652.13), and if he fails to report to the camp or if he reports and thereafter absents himself from the camp without authority he is violating the act and regulations (Regs.

653.12, 691.17 (a) (c)).[5] If the registrant reports to the camp, he is accepted by the camp director, who is required to accept all registrants who are assigned to his camp. During the registrant's first few days at camp he receives a routine examination by the camp doctor, but the outcome of the examination bears no relation to the registrant's acceptance at the camp[6] (Regs. 653.11 (b) (c)). It is in this latter respect that the procedure differs from that which prevailed at the time of *Falbo's* case. At that time it was possible for a registrant to be rejected upon examination at the camp (see 320 U. S. at 553) and the procedure thus paralleled the procedure for inducting men into the armed forces.[6]

Unlike the procedure which prevails for registrants going into the armed forces (see *Billings* v. *Truesdell*, 321 U. S. 542, 549–554), in the case of a registrant assigned to a Civilian Public Service Camp there is no formal induction ceremony. The reason for the difference in procedure may be found in the fact that only a registrant who

[5] In the case of a selectee assigned to military service, Section 11 of the act provides that he is subject to trial by court martial after he has been "actually inducted" for training and service under the act.

[6] We have set forth in Appendix C, *infra*, pp. 75–80, a summary, prepared by the Selective Service System, of the historical background of Section 653.11(c) of the Selective Service Regulations, which sets out the text of the provision at the time of *Falbo's* case and the present language of the provision, and which explains the reasons for the change in the procedure in this respect.

has claimed exemption from military service because he is conscientiously opposed to all war is classified IV–E and assigned to a camp. Section 5 (g) of the Act requires that any person "claiming such exemption" shall "be assigned to work of national importance." Since by asserting the claim the registrant necessarily causes his assignment to work of national importance, there is no occasion for an induction ceremony in which he will be able to choose between submitting to work of national importance and defying the Act. However, whatever may be the reason for the absence of an induction ceremony, the fact is that acceptance by the camp is accomplished by the Camp Director's noting the fact of acceptance on D. S. S. Form 221 (Reg. 653.11 (c), *infra*, p. 72). Thereafter the selectee is a member of the camp with the rights and duties of a person in that status.

Petitioner was accepted at the camp.—The procedure which we have outlined was followed in this case. After petitioner was classified IV–E, he was given a preinduction physical examination (see R. 37, Ex. 16–19), and he was issued a Certificate of Fitness (see Ex. 91). Thereafter he was assigned to the Hill City, South Dakota, Civilian Public Service Camp by the Director of Selective Service (see Ex. 9). On August 8, 1944, the local board ordered petitioner to report for work of national importance on August 21. That order (Ex. 10) provides, in pertinent part:

Having been found to be acceptable for work of national importance under civilian direction, you have been assigned to the Civilian Public Service Camp #57 located at Hill City, Pennington County, in the State of South Dakota.

You are ordered to report to the local board named above at 2:00 p. m. on the 21st day of August, 1944, where you will be furnished transportation and given instructions to proceed to the camp.

You are ordered to report to the camp pursuant to the instruction of the local board, to remain in the camp, and to perform your prescribed duties until such time as you are released or transferred by proper authority.

You will be examined at the camp for communicable diseases and instructed as to your duties.

Failure * * * to remain in the camp and perform your duties until released or transferred by your authority will constitute a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to punishment by fine or imprisonment or both.

Consistently with the command of the local board's order, petitioner reported to the board on August 21 and he entrained for camp, arriving there on August 23. Under Section 652.13 of the Selective Service Regulations, petitioner became subject to the jurisdiction of the camp as soon as he left the local board's office on August

21. It was stipulated at the trial that petitioner was "enrolled" in the camp on August 23 (R. 30). During the next few days he underwent a conditioning period and on August 28 he was physically examined by the camp doctor, who found petitioner in satisfactory condition. It was after this that petitioner deserted from the camp.

Throughout the litigation there has been no dispute among the parties concerning the fact of petitioner's acceptance at the camp. In our view, the stipulation at the opening of the trial that petitioner was "enrolled" in the camp "on or about August 23, 1944" (R. 30) was intended to remove from the case any issue concerning petitioner's status as a member of the camp. Thus, the United States Attorney told the court that in his view the only disputed issue in the case was whether petitioner deserted the camp (R. 30–31). Petitioner's counsel suggested two additional issues: whether petitioner acted "knowingly" and whether the order to report was void because he is a minister (R. 31). He did not suggest that there was any factual dispute as to whether petitioner had been accepted at the camp or that the stipulation was not intended to include this factor in the term "enrolled." Similarly, at no time during the course of the trial did petitioner challenge the sufficiency of the Government's evidence on the ground that acceptance at the camp had not

been established. And neither in the circuit court of appeals nor in this Court did petitioner suggest that in fact he had not been accepted at the camp. Instead it was assumed throughout the proceedings, undoubtedly in reliance upon the stipulation, that when petitioner deserted, he was a full-fledged member of the camp.

In ordering this case restored to the docket for reargument before a full bench, this Court directed "special attention" to the question whether petitioner was accepted by the Civilian Public Service Camp. The parties, as we have said, are not in dispute as to this issue. There is no question that in compliance with the procedure established by the regulations, petitioner was accepted by the camp. So that the position of both parties on this aspect of the case is clear, counsel for petitioner and for the Government on July 2, 1946, stipulated the following facts:[7]

> 1. After petitioner reported to Civilian Public Service Camp No. 57 he was accepted by the camp for work of national importance.
>
> 2. His acceptance was noted by the camp director on page 4 of D. S. S. Form 221 and that form was forwarded to the Director of Selective Service in accordance

[7] The stipulation and the exhibit attached to it have been filed with the Clerk.

with the procedure prescribed by the Selective Service Regulations.[8]

3. The attached photostatic copy of D. S. S. Form 221, reciting that petitioner was accepted for work of national importance at C. P. S. No. 57 on August 23, 1944, is a true and correct copy of the D. S. S. Form 221 which the Director of Selective Service received from the ~~camp~~ director and which is presently contained in the official files of the Selective Service System.[9]

4. The parties were not in dispute in the District Court and in the Circuit Court of Appeals concerning petitioner's acceptance at the camp, and they are agreed in this

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[8] Section 653.11(c) provides that irrespective of the determination made upon physically examining the registrant at the camp, the camp director "shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a [the] registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned." The regulation further directs that the original of form 221 shall then be forwarded to the Director of Selective Service.

[9] At the bottom of page 4 of the form, the following appears: "Accepted for work of national importance at C. P. S. Camp No. 57. Place *Hill City, S. Dak.* Date *8-23-44*. Signature (*s*) *Paul G. Tschetter*, Camp Director."

In *Bowles* v. *United States*, 319 U. S. 33, this Court took judicial notice of three documents contained in the registrant's selective service file and, indeed, disposed of the case on the basis of the documents. Thus, even apart from the stipulation there would seem to be no question that the Court might take judicial notice of form 221 contained in the files of the Camp Operations Division of the Selective Service System and of the fact that it shows that petitioner was accepted at the camp on August 23, 1944.

Court that he was accepted by the Civilian Public Service Camp to which he was assigned.

The stipulated facts, we think, leave no room for question concerning petitioner's acceptance by the camp and bring into sharp focus the question whether the acceptance bars the defense of the alleged improper classification.

II

HAVING BEEN ACCEPTED AS A MEMBER OF THE CIVILIAN PUBLIC SERVICE CAMP TO WHICH HE WAS ASSIGNED, PETITIONER HAD THE DUTY TO REMAIN AT THE CAMP AND TO PERFORM WORK OF NATIONAL IMPORTANCE UNTIL HE WAS LAWFULLY DISCHARGED. MISCLASSIFICATION IS NO DEFENSE TO A PROSECUTION FOR HAVING FAILED TO PERFORM THAT DUTY

The issue.—In *Estep* v. *United States*, Nos. 292 and 66, decided February 4, 1946, this Court held, in considering the situation of selectees who had been found acceptable for service but who refused to submit to induction, that the provision of Section 10 (a) (2) of the Act making the classification of a selective service board "final" does not foreclose a registrant who has exhausted his administrative remedies from securing a judicial inquiry to determine whether the classifying board exceeded its jurisdiction. Since petitioner, by going one step further and becoming a member of the camp, concededly exhausted his remedies, there is no question in this case whether he was entitled to test the legality of his classification in the courts. The question which the case presents is a narrower one

relating to the method by which judicial inquiry is obtained. It is undisputed that so long as petitioner was at the Civilian Public Service Camp he was free to initiate a judicial inquiry into his selective service classification by resorting to habeas corpus. And we do not understand petitioner to dispute the fact that in such a habeas corpus proceeding he could have obtained the same judicial review which he would have secured if the trial court had permitted the defense of illegal classification in the criminal trial. The sole question in dispute is whether instead of resorting to habeas corpus petitioner was free to desert the camp for the purpose of instigating a criminal proceeding in which he might test the legality of his classification.

Stated briefly, it is the Government's view that the Director of Selective Service has required that, as in the armed forces, every member of a Civilian Public Service Camp shall remain at the camp until he is lawfully released. As a member of the camp, petitioner breached his duty of remaining at the camp by leaving without having been released either by order of the Director of Selective Service or by order of a court. It is no defense to a breach of that duty to show that if petitioner had proceeded in a lawful manner and had resorted to habeas corpus his classification would have been found to be unlawful. The offense here is leaving the camp without authority and that is an offense regardless of whether peti-

tioner was properly classified. Considerations of policy justify denying a member of a Civilian Public Service Camp the right to defy the law where, as in this case, an adequate and a less hazardous remedy is available to him if he remains at the camp and resorts to habeas corpus.

As we understand petitioner's position, he agrees that he was accepted at the camp and that he deserted from it. His sole contention is that he was improperly classified by his board of appeal and that he therefore had no duty to remain in the camp; that if he was illegally classified the camp director could not acquire jurisdiction over him.

Petitioner's Duty Under the Selective Service Regulations.—The trial court found (R. 22) as a fact that—

> Without any authority and in violation of the rules and regulations prescribed under the Selective Training and Service Act, and particularly Section 653.12 of the Selective Service Regulations, on August 28th, 1944, the defendant left the said camp permanently. He deserted the camp.

We think the finding is unassailable. When petitioner was accepted at the camp he acquired the same rights and duties as the other members of the camp. Section 653.12 of the Selective Service Regulations imposed on petitioner the duty, among others, to remain in the camp "until

released or transferred elsewhere by proper authority," and to perform his "assigned duties promptly and efficiently" (*infra*, p. 72). See also Sections 652.11 (a) and 691.17 (*infra*, pp. 67–68, 73–74), which complement Section 653.12.

Petitioner's argument (Br. 43–59) that he did not waive his rights by reporting to the camp misconceives the Government's position in this case. Plainly, a selectee who submits to induction or who is accepted by a Civilian Public Service Camp does not relinquish his right to challenge the validity of the administrative action. Since he acts under compulsion of law (see *Billings* v. *Truesdell*, 321 U. S. 542, 556), we think there can be no serious question that he does not waive his right to challenge his classification merely because he complies with the law. If petitioner had submitted to induction into the army he would have been able to do this by habeas corpus. The same remedy was available to him as a member of the Civilian Public Service Camp. Petitioner's argument overlooks the fact that by becoming a member of the armed forces or a Civilian Public Service Camp a selectee acquires a new status with new rights and duties. Among the duties imposed upon him is the duty not to desert. It is the acquisition of this duty rather than any theory of waiver which, in our view, forecloses a soldier or a member of a Civilian Public Service Camp from deserting with impunity on the ground that he should have been classified differently.

It is important to recognize the fact that petitioner's position in a habeas corpus proceeding would not be the same as it would be in a criminal proceeding. While resorting to habeas corpus he is in compliance with the law and he seeks a judicial determination of his legal rights. In the criminal proceeding he is before the court as one who has violated an applicable regulation of the Selective Service System. The trial has as its objective the determination of whether he knowingly violated the regulation. The propriety of his classification is not in issue, for the duty to comply with the regulation, as we shall show, extends to all who are members of the Civilian Public Service Camps, regardless of the correctness of their classifications.

Petitioner's argument (Br. 53–55) that if he is a minister of religion, there is no jurisdiction to compel him to remain in a Civilian Public Service Camp because ministers are exempt from service under the Act overlooks Section 10 (a) (2) of the Act. This provision lodges in the Selective Service boards exclusive power to hear and determine all claims for exemption from service under the Act. It may be assumed, *arguendo,* that there would be no power under the Act to detain in a camp a selectee who had been found to be exempt from service by the boards. But that is not this case. Petitioner was not found to be exempt from service, hence there is no basis for his argument in this respect. Until such time as the finding of the

boards that he was not exempt from service was set aside he was obligated to remain at the camp and to perform work of national importance. In this respect petitioner's position is no stronger than it would have been if he had been classified I-A and had submitted to induction into the armed forces. Section 11 of the Act contemplates that every registrant who submits to induction becomes subject to military jurisdiction, for it provides that after induction his violations of the Act may be tried by any military or naval court martial. No exception is provided for a person who submits to induction even though he believes he was misclassified. Under Section 11, if petitioner had submitted to induction into the armed forces his desertion thereafter would have been prosecutable in a military court martial regardless of whether his selective service board properly classified him. Induction involves a transfer of jurisdiction and the acquisition of new rights and duties by the inductee. See *Billings* v. *Truesdell*, 321 U. S. 542, 551–559.

The same is true in this case. When petitioner reported to the camp and was accepted by the camp director his status changed to that of a member of the camp. As a member, he acquired the same rights and duties as every other member of the camp, including the duty to remain at the camp until he was lawfully released.

Petitioner's argument overlooks, in our view, the settled doctrine in the law that in cases of

compelling public necessity the individual may be required to comply with the law until his rights are determined by the courts. *Yakus* v. *United States*, 321 U. S. 414, is an example of the application of this doctrine in another context. Other examples are enumerated in *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed by an equally divided Court, 323 U. S. 682. Perhaps the clearest example of the application of this doctrine is in respect of the armed forces. We doubt that if petitioner had been inducted into the armed forces, he would have been entitled thereafter to lay down his arms and desert his post of duty because he believed that he should have been classified as a minister of religion. Quite clearly, it would have been his duty to comply with the regulations of the armed forces until such time as he was lawfully released from the military service. It is well established in practice that if a soldier seeks to challenge the exercise of military jurisdiction over him the appropriate procedure is to resort to habeas corpus. See e. g., *In re Grimley*, 137 U. S. 147; *In re Morrissey*, 137 U. S. 157; *Stingle's* case, Fed. Cas. No. 13458 (E. D. Pa); *Arbitman v. Woodside*, 258 Fed. 441 (C. C. A. 4); *Cramer* v. *France*, 148 F. 2d 801 (C. C. A. 9); *United States ex rel. Philips* v. *Downer*, 135 F. 2d 521 (C. C. A. 2); *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795; *Ex Parte Stanziale*, 138 F. 2d 312 (C. C. A. 3),

certiorari denied *sub. nom. Stanziale* v. *Paullin*, 320 U. S. 797; *Harris* v. *Ross*, 146 F. 2d 355 (C. C. A. 5); *Benesch* v. *Underwood*, 132 F. 2d 430 (C. C. A. 6); Cf. *Billings* v. *Truesdell*, 321 U. S. 542.

And it has been held in habeas corpus that a registrant who was inducted into the armed forces under the 1917 Act could not desert and thereafter seek to escape the consequences of his desertion by contending that he was in fact exempt from military service and should not have been inducted. *Ex Parte Kerekes*, 274 Fed. 870 (E. D. Mich.); *Ex Parte Tinkoff*, 254 Fed. 912 (D. Mass.); *Ex Parte Romano*, 251 Fed. 762, 764 (D. Mass.);[10] Cf. *Ver*

[10] Under the 1917 Act, the Judge Advocate General repeatedly ruled that a plainly mistaken classification did not void the induction and, accordingly, the registrant was required to apply to the military for discharge. JAG 334.4, June 7, 1918; JAG 327.3, October 30, 1918, November 9, 1918. And an erroneous classification was held no defense in a court martial for desertion arising out of failure to report for induction. See C. M. 122312, Grant (1918) (Section 2238, Digest of Opinions, Judge Advocate General, Volume 1912–1930), in which it was stated—

"* * * While it is true there was no direct evidence that the accused was registered or classified, the order to entrain and proceed to camp is established beyond all doubt. The order imports rightfulness and verity as against any assault in these proceedings." (C. M. 122330, Choroshen; C. M. 113991, Aniki.)

We are advised by the War Department that its present position is reflected by a decision of the Board of Review No. 1 on December 11, 1944 (C. M., E. T. O. 4820, Skovan). In that case, the specification against the accused charged that while en route to join his company as a replacement the accused misbehaved himself before the enemy by refusing to go forward and join his company. The evidence showed that the accused expressly refused to go forward because he

Mehren v. *Sirmyer*, 36 F. 2d 876 (C. C. A. 8), in which the registrant was ordered discharged from military custody because it was determined that he never had been inducted.

This same view is represented by an analogous line of cases involving minors who unlawfully enlisted in the armed forces without the consent of their parents. While it was held that the parents might procure the release of their sons from military service by resorting to habeas corpus, the courts recognized that until the enlisted men were discharged, they were required to perform military duties; it was held that if the enlisted man was confined by the military authorities on a charge cognizable by a military court habeas corpus would not lie until he had served any sentence imposed by the military court. *In re Scott*, 144 Fed. 79 (C. C. A. 9); *In re Carver*, 142 Fed. 623 (D. Me.); *Dillingham* v. *Booker*, 163 Fed. 696, 698 (C. C. A. 4); *United States ex rel. Laikund* v.

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claimed that he was a conscientious objector. After considering the nature of the accused's beliefs and the proceedings before the Selective Service System, the Board of Review stated:

"Although the Board of Review has deemed it proper and advisable in this case to give serious consideration to accused's defense, it is not the intent hereby to imply that a soldier, regularly inducted into and accepted by the military service, may in a military court defend a charge against him arising under the Articles of War on the ground that he was wrongfully inducted into the military service. Conversely the Board is decidedly of the opinion that the authorities above cited sustain the opposite principle. Strictly speaking the court should have excluded all of defense's evidence pertaining to accused's draft status as irrelevant to the issues."

Williford, 220 Fed. 291 (C. C. A. 2); see also, Manual for Courts-Martial, United States (1928), p. 199.

The doctrine upon which we rely finds support likewise in the construction which the courts have given section 9 of the Act of May 14, 1930, 46 Stat. 327 (18 U. S. C. 753h), which makes it an offense for a person confined in a federal penal institution to escape or attempt to escape from such custody. In *Aderhold* v. *Soileau,* 67 F. 2d 259 (C. C. A. 5), it was contended that a sentence for escape in violation of this statute was void because the original sentence under which the prisoner was detained was so uncertain as to be void. In an opinion by Judge Sibley, the Circuit Court of Appeals for the Fifth Circuit disposed of the contention as follows (p. 260):

> * * * If the sentence here in question to the Industrial Reformatory be so indefinite as that Soileau was entitled to be resentenced, he was bound to question it only by regular and legal means. A prisoner in a penal institution whose sentence is irregular or voidable may not for that reason, and before some court has so adjudged, defy his guards and run away. A difference of opinion might cause a death. Such a doctrine would set discipline at naught. The statute, 18 USCA § 753 (h), forbids escape, not only to those "properly in the custody of the Attorney General" but also to all "who are confined

> in any penal or correctional institution, pursuant to his direction," without mention of the propriety of the confinement. We are of opinion that attempts at escape from such institutions are thereby forbidden to all inmates, and that, if they consider their confinement improper, they are bound to take other means to test the question.

To the same effect see *United States* v. *Jerome,* 130 F. 2d 514, 519 (C. C. A. 2), certiorari denied as to this point, 317 U. S. 606; *Bayless* v. *United States,* 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748. Compare *Jones* v. *State,* 158 Miss. 366, and *Commonwealth* v. *Ashe,* 142 Pa. Super. 403, where it was held that prosecution for escape from prison while an appeal from a criminal conviction was pending is not foreclosed by the subsequent reversal of the conviction. In *Kelley* v. *Meyers,* 124 Ore. 322, the Oregon Supreme Court rejected the contention that justification for attempting to escape existed in the fact that it was claimed that the statute under which the prisoner was originally convicted was unconstitutional, the court suggesting that if the prisoner desired to test the constitutionality of the statute, his sole remedy would have been to resort to habeas corpus.

The doctrine illustrated by the examples set forth above underlies the requirement of Section 653.12 that a member of a Civilian Public Service

Camp shall remain at the camp until he is lawfully released. We do not understand petitioner to dispute the fact that Section 653.12 extends to every member of a camp, regardless of what he may think of his selective service classification, and we think there can be no serious question as to the scope of this provision. The language of the regulation is all-inclusive, for by the term "assignee" it extends to every person classified IV–E who is assigned to a Civilian Public Service Camp.

Other provisions of the Selective Service Regulations make it plain that the Director contemplated that some members of Civilian Public Service Camps might be dissatisfied with their classifications, for they provide machinery for reopening the classification administratively. Section 626.2 (b)[11] requires the local board to reopen the classification of a member of a camp whenever the Director of Selective Service so requests in writing. We are advised by the Selective Service System that on the basis of this power it is an established administrative practice that if a member of a camp believes he was misclassified, he may request the Director of Selec-

[11] At the time when petitioner was in the camp, Section 626.2 (b) provided that "After a registrant has left the local board for delivery pursuant to an order to Report for Work of National Importance (Form 50) the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service." This provision is presently found in Section 626.2–1 of the Regulations.

tive Service to intervene and to direct the local board to reopen the classification and consider the question anew. If it is made to appear that the registrant may have been misclassified, the Director grants the request and directs the local board to reopen the classification. If the board changes the classification from IV–E, the registrant is, of course, released from the camp. Additionally, Section 691.17 (d), relating to recalcitrant members of the camps, provides that if, after a registrant has become a member of a Civilian Public Service Camp, it appears that he may have been misclassified, the Director of Selective Service may take the necessary steps to have the classification reopened by the registrant's local board. Significantly, the section provides further that if such a registrant fails to perform his duties at the camp, the Director "may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended."

Notwithstanding the Director's recognition of the fact that some registrants at Civilian Public Service Camps would be dissatisfied with their classifications, Section 653.12 contains no exception for such persons. Instead its terms bespeak the Director's policy that every member of a camp shall remain there until he is lawfully released.

The administrative necessity which underlies the requirement of Section 653.12 is a real one.

Successful administration of the camps would be difficult, if not impossible, if members of the camps were free to resort to self help whenever they believed they had a justifiable grievance. Experience has demonstrated that if a few persons successfully defy the constituted camp authorities others are encouraged to do so too, whether they have a justifiable grievance or not. Successful small-scale defiance of the camp authorities is apt to develop into large-scale defiance. Moreover, it should be noted that many members of Civilian Public Service Camps are engaged in work which is of importance to the public welfare. If any one of these persons were permitted to desert with impunity because he desired to test the legality of his selective service classification the consequences very likely would be as serious as the consequences incident to desertion from the armed forces. For example, some members of the camps have been assigned to the Office of Scientific Research and Development for experimental and research work in the field of medicine. Many have been assigned to public hospitals and institutions. Others have been assigned to agricultural tasks or to forest fire fighting responsibilities.[12] If any of these

[12] For a discussion of some of the projects to which members of Civilian Public Service Camps are assigned see the annual reports of the Director of Selective Service. *Selective Service in Peacetime*, pp. 196–201; *Selective Service in Wartime*, pp. 262–272; *Selective Service as the Tide of War Turns*, pp. 182–188.

individuals deserted, they might very well ruin an important and costly experiment; a hospital or parts of it might be left seriously understaffed, or other similar consequences might be anticipated if members of camps are not treated in the same manner as members of the armed forces to the extent that they are required to perform service under the Selective Training and Service Act until they are lawfully relieved of the duty. In short, we think that Section 653.12 is a proper exercise of the power, conferred on the President by Section 10 (a) (1) of the Act and delegated to the Director of Selective Service, to prescribe the necessary rules and regulations to carry out the provision of Section 5 (g) that in lieu of military service conscientious objectors shall be assigned to work of national importance.

Our view of the Selective Service Regulations does not mean that petitioner would have been denied access to the courts to test the legality of his classification or even that he would have been substantially prejudiced in any respect. Indeed, it accords him all that he sought in the criminal trial. Since a member of a camp is subject to restraint by the camp director, he is always free to challenge the legality of that restraint by resorting to habeas corpus. See, e. g., *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C. C. A. 2), certiorari denied, 325 U. S. 881; *United States ex rel. Bodenstein* v. *Nichols*, 151 F. 2d 155 (C. C. A. 3). Thus, for example, from

August 23, 1944, when petitioner was accepted at the camp, until he deserted petitioner might have instituted a habeas corpus action to inquire into the legality of his classification. If petitioner had done this, the writ would have issued within a matter of days (see 28 U. S. C. 454–461), the camp director would have made a return showing by what authority he exercised jurisdiction over petitioner, and an inquiry would have been had to determine the legality of petitioner's classification. If petitioner prevailed, he would have been discharged from the camp without delay. On the other hand, if the habeas corpus court rejected petitioner's contention, he would have been remanded to the camp to continue his service under the act.

Such a procedure would not have unduly interfered with the orderly administration of the camp system and it would have accorded petitioner everything he would have obtained in the criminal trial if the trial court had permitted his proffered defense.[13] At the same time it would not have

[13] We think that none of the considerations advanced by Mr. Justice Murphy, concurring in the *Estep* case, as demonstrating that in the situation of a registrant ordered to submit to induction into the armed forces habeas corpus as a remedy "may be quite illusory in many instances" (slip opinion, p. 12), are persuasive in the context of this case. As a member of the camp, petitioner was not under military jurisdiction and there was no summary court-martial procedure in the camp. Instead, substantial violations of the regulations are prosecuted in the civil courts pursuant to Section 11 of the Act. There is no suggestion in this case that peti-

entailed any of the disadvantages of the procedure adopted by petitioner. It seems clear from the *Estep* decision that the scope of judicial inquiry into the selective service classification would have been the same in habeas corpus as it would be in a criminal trial. And since petitioner waived a jury trial (R. 29) in the district court, it is plain that he did not foresee any advantage in trying his case before a jury. On the other hand, by deserting from camp and causing the institution of criminal proceedings petitioner was not in the position of one who was complying with the law until his rights were judicially determined. Instead he was in the position of having violated the Selective Service Regulations applicable to him. In contrast with the expeditious hearing in the habeas corpus court the criminal trial neces-

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tioner's religious or conscientious scruples made it impossible for him to resort to habeas corpus. Petitioner was required to do nothing more than maintain the status quo until a habeas corpus court considered his case. Since the desertion occurred in the District of South Dakota it is plain that either a criminal trial or a habeas corpus inquiry would be in the United States District Court for the District of South Dakota where the camp is located and where the offense occurred. See *United States* v. *Anderson*, No. 447, decided June 10, 1946. There would be no danger of a habeas corpus case becoming moot by the removal of petitioner to another district if available judicial remedies, such as a stay order, were pursued. And the long-standing policy of the Selective Service System that habeas corpus is the proper remedy for a registrant who believes he is illegally classified suggests that there is no real danger that selective service officials would fail to treat a habeas corpus petitioner with "sympathetic understanding" (*Estep* case, slip opinion, p. 12).

sarily involves issues other than the legality of the administrative action and it affords ample opportunity for delay. Even more important, however, than the time-consuming delays occasioned by a criminal proceeding is the fact that if petitioner were unsuccessful in his defense in the trial, he would not, as in habeas corpus, be remanded to the Civilian Public Service Camp to perform work of national importance. Instead, he would be a convicted felon who is sent to prison.

The availability to petitioner of the same judicial review by way of habeas corpus which he sought in the criminal trial demonstrates quite plainly that it was wholly unnecessary for petitioner to run the risk of violating the act and regulations for the purpose of challenging the legality of his selective service classification. It is clear, at least since *Yakus* v. *United States*, 321 U. S. 414, 444–446, that petitioner has no "right" to insist that the issue be tried in a criminal proceeding. For as the Court said in the *Yakus* case (at page 444), "there is no constitutional requirement that that test [of the validity of a price order] be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here."

In taking the position which we have urged, we are mindful of the fact that petitioner reported to the Civilian Public Service Camp to which he

was assigned and deserted after he had been accepted at the camp, because it was his belief that this was the appropriate procedure for testing the validity of his selective service classification. As we have shown, we think he was mistaken in following the procedure he adopted instead of applying for habeas corpus or for reclassification under the administrative procedure which we have outlined. Whether his motive was good or bad the fact remains, however, that he admittedly became a member of the camp and by deserting from the camp he purposely failed to perform the duties imposed upon him. It is a permissible inference that petitioner acted on advice of counsel. For unadvised registrants ordinarily do not speak in terms of exhausting the administrative process, as petitioner did when he announced his plan to leave the camp (see R. 75). The camp director warned petitioner that if he deserted camp, he would be convicted and sent to prison (R. 39, 74). Despite the warning petitioner deserted. In these circumstances, we think he assumed the risk that the legal advice upon which he relied was correct. "Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime."[14] *Williams* v. *North Carolina*, 325 U. S. 226, 238.

[14] Petitioner's argument (Br. 64–68) that the trial judge improperly denied him the opportunity to prove that he did not have an evil motive is, we think, without merit. Section 11 of the Act provides for the punishment of anyone who "knowingly" fails to perform a duty required of him by the

If petitioner's conviction is affirmed, a measure of relief may still be available to him. Rule 35 of the Federal Rules of Criminal Procedure permits a trial court to reduce a sentence within 60 days "after receipt by the court of a mandate issued upon affirmance of the judgment." If, as we think, the rule applies to the affirmance of a judgment by this Court, this case may be an appropriate one for the granting of such relief. When petitioner was sentenced the trial judge was of the view that *Falbo* v. *United States*, 320 U. S. 549, clearly settled the law against petitioner. Developments since then make plain the fact that this is in reality a test case and that the applicable rule of law now must be determined by this

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Act or regulations. This Court recently had occasion to point out (see *Screws* v. *United States*, 325 U. S. 91, 96–97) that, "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." This is so, the Court said, even though "his motive was pure." In this case petitioner purposefully deserted the camp after having been warned of the consequences by the camp director. By doing so, he knowingly failed to perform a duty required of him by the Selective Service Regulations. The decisions relied upon by petitioner (Br. 65) do not aid him. Both the *Keegan* (325 U. S. 478) and *Okamoto* (152 F. 2d 905 (C. C. A. 10)) cases were concerned with the construction of the evasion provision of Section 11; neither holds that to act knowingly one must act with evil purpose. The *Murdock* case (290 U. S. 389) involved a construction of "willful" in another context. See *Screws* v. *United States*, *supra*, at p. 101.

Court for the first time. These developments, in our view, would justify the trial judge in reconsidering the sentence imposed upon petitioner, taking into consideration the time which petitioner already had served prior to his release on bail by this Court.[15]

III

IT AFFIRMATIVELY APPEARS FROM THE INFORMATION CONTAINED IN PETITIONER'S SELECTIVE SERVICE FILE, WHICH HE OFFERED IN EVIDENCE, THAT HIS SECT WITHDREW ITS RECOGNITION OF HIM AS A MINISTER OF RELIGION. THERE IS THUS FOUNDATION IN FACT FOR THE REFUSAL OF THE BOARD OF APPEAL TO CLASSIFY HIM AS A MINISTER OF RELIGION

Even if we are mistaken in our view that the defense of illegal classification is barred by petitioner's acceptance by the Civilian Public Service Camp, we think the judgment of the circuit court of appeals should be affirmed. For it plainly appears from the evidence tendered by petitioner in support of his claim that he was illegally classified *that his own sect had withdrawn its recognition of him as a minister* and that there is thus foundation in the facts before petitioner's

[15] On the first argument petitioner urged that venue was improperly laid in the District of South Dakota and that the case should have been tried in the district where his local board is located. The contention apparently has been abandoned on reargument. In any event the decision in *United States* v. *Anderson*, No. 447, October Term 1945, decided June 10, 1946, that prosecutions under Section 11 shall be in the district in which the offense occurs, notwithstanding the fact that the local board may be located in a different district, fully disposes of the contention.

board of appeal for the board's refusal to classify him as a minister of religion.[16]

There is no claim in this case that petitioner was denied any procedural rights. The sole contention advanced by petitioner in the trial court was that as a Jehovah's Witness he was a minis-

[16] While this Court has at times indicated a reluctance to consider the merits of a tendered defense when it does not have the benefit of the lower courts' determinations on the question, there are exceptional circumstances when it has departed from this practice. Thus, for example, in *Bowles* v. *United States*, 319 U. S. 33, the Court found it unnecessary to consider whether Bowles should have been permitted to defend on the ground that the classifying boards misconstrued the Act, because the Court concluded that the defense, if permitted, would not be a good one. In the concurring opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, Mr. Justice Rutledge likewise considered Falbo's tendered defense and concluded that it was not meritorious. We think the lack of merit in petitioner's tendered defense is so evident that the same procedure should be followed in this case. As we show in the text, it is apparent from petitioner's selective service file, which he tendered in evidence (R. 48–55) and which is before this Court, that he will not be able to establish that there is no foundation in the facts before the selective service boards for their refusal to classify him as a minister. Thus, if a retrial becomes necessary, it is to be anticipated that a conviction will result and that petitioner again will be sentenced to imprisonment. He will receive no credit for the time he already has served and the time for computing his eligibility for parole and for conditional release will start anew with the commencement of the new sentence. In these circumstances, bearing in mind the plain inadequacy of the tendered defense, we submit, if the Court disagrees with our position in Part II of the Argument, that the Court dispose of the merits of the tendered defense at this time without requiring further proceedings in the district court.

ter of religion and that he had been improperly denied exemption from service; that the classifying boards acted arbitrarily and capriciously in refusing to classify him IV-D. In support of this contention petitioner offered in evidence the material contents of his selective service file (see R. 48–55). Additionally, he tendered *de novo* evidence concerning his alleged status as a minister of religion (R. 57–59, 66–69). All of this tendered evidence, including the documents from the file, are presently before this Court. In our view none of the offers of proof tendered the defense of misclassification, even assuming petitioner's right to defend on that ground. Cf. *Sunal* v. *Large*, No. 5490, decided July 29, 1946 (C. C. A. 4). For this reason alone we think the judgment should be affirmed.

In the *Estep* decision this Court (slip opinion, pp. 6–7) defined the standard to be applied in inquiring into the validity of a selective service classification as follows:

> The provision making the decision of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may

> be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

This means, in our view, that petitioner bore the burden in the district court of showing by his offers of proof that there is not any evidence in his selective service file to support the denial of his claim to ministerial classification. Patently, the *de novo* evidence offered by petitioner at the trial (R. 66–69) does not show that the classifying board's classification is without foundation in fact. The propriety of an administrative board's determination plainly cannot be tested by considering evidence concerning petitioner's alleged activities which was never adduced before the board and which, of course, was not considered by it in making the classification. Cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–187. Petitioner's *de novo* evidence would have been material only if it was for the court to inquire *de novo* into his ministerial status. The quoted language from the *Estep* decision conclusively, in our view, demonstrates that this is not the function of the courts. Since the *de novo* evidence had no probative value in considering the narrow question whether the classifying board acted in the teeth of all the evidence before it, we believe the trial judge properly excluded this evidence. See *Smith*

v. *United States,* No. 5487, decided July 29, 1946 (C. C. A. 4).

The remaining evidence relied upon by petitioner consisted of documents from his selective service file. If these documents showed that there is no foundation in fact for the denial of his ministerial claim they would have tendered the defense of misclassification. The difficulty with petitioner's offers of proof in this respect is that, as we shall show, they do not prove what he sought to establish—that all the evidence before the boards showed that he was a minister of religion.

Ministerial status.—To demonstrate to the selective service boards that he was an ordained minister of religion, as he claimed, petitioner was required to meet the standards of Section 622.44 (c) of the regulations as construed with respect to Jehovah's Witnesses by the Director of Selective Service in Opinion No. 14 (amended), promulgated November 2, 1942. Section 622.44 (c) (*infra,* p. 63) defines a duly ordained minister of religion as—

> a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs these duties.

On June 12, 1941, the Director of Selective Service issued Opinion No. 14 and on November 2,

1942, he issued Opinion No. 14 (amended)."[17] The latter opinion was in effect during the period when petitioner was finally classified by his board of appeal. This opinion stated that Jehovah's Witnesses were considered to constitute a recognized religious sect and that certain members of the group "by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions." The opinion stated that a certified official list had been prepared which contained the names of those members of the sect whose activities made them eligible for classification as a minister of religion. In respect of persons whose names were not on the list the opinion explained that—

> It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same rela-

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[17] On June 7, 1944, this opinion was superseded by State Director Advice No. 213–B, which in turn, was amended on September 25, 1944; these do not substantially change the views expressed in Opinion No. 14 (amended). For a historical summary of the background of Opinion No. 14 and of its function, see the Brief for the United States, pp. 64–78, in *Falbo* v. *United States*, No. 73, October Term, 1943.

> tionship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

The question which this aspect of the case presents is whether the information in petitioner's selective service file, tested by these standards, required the board of appeal to find that petitioner was a minister.

The facts bearing on petitioner's final classification.—The pertinent facts relating to petitioner's selective service classification, as shown by the documents from his selective service file which were admitted or offered in evidence, may be summarized as follows:

Petitioner registered with Local Board A, Union County, Arkansas, and on October 12, 1942, he filed his selective service questionnaire (Ex. 1–8). In that document he stated that he was twenty years old; that he had completed eight years of elementary school and one year of high school; and that, in addition, he had attended and was still attending "Divinity School." In answer-

ing Series IV of the questionnaire concerning his "Present Occupation or Activity" he stated that he is a minister of religion; that he had four years experience in this work; and that his earnings consisted of contributions received from this work. In answering Series VI, relating to "Occupational Experience, Qualifications, and Preferences," petitioner stated that he had been a farm laborer from 1934 to 1940 and that he preferred "ministry work." In Series VIII, relating to the ministry, he stated that he had been an ordained minister of religion since 1938,[18] and that he is a student preparing for the ministry in a theological or divinity school. In Series X petitioner claimed exemption from military service as a conscientious objector. He requested classification in IV–D.

Petitioner also filed with the local board the special form provided for registrants asserting conscientious objections to military service. In that document (Ex. 37–40) he summarized his religious views concerning the use of force and he described his activities as follows: "I have part in our service meetings at least four times a month, and do preside at bible studies in the homes of people of good will, once a week. I give public expression daily, by going from house to house 'preaching this gospel of the Kingdom.'

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[18] In an Occupational Questionnaire (Ex. 31–32) filed with the local board in September 1942, petitioner informed the local board that he had been an ordained minister since May 21, 1940.

* * *." In addition, he stated that he became a member of the Jehovah's Witnesses sect in 1937 and that he was the leader of "Kingdom Hall of Jehovah's Witnesses" in El Dorado, Arkansas.

At the same time that he filed these documents petitioner filed a letter (Ex. 33–36) and other supporting exhibits. In the letter he said that he had been a full-time minister since 1940 and he described his ministerial activities as "going from house to house and throughout the villages." The other exhibits consist of a certification dated July 5, 1941, by the Watchtower Bible and Tract Society that petitioner is an ordained minister of religion (Ex. 29); an identification card furnished petitioner by the Watchtower Society (Ex. 30); a copy of Consolation magazine, No. 551, October 30, 1940, which explained the position of the sect in respect of a military draft; a copy of Consolation magazine, No. 569, July 9, 1941, which contained a list of Jehovah's Witnesses, including petitioner, who were recognized by the sect and by the Director of Selective Service as ministers of religion; and a booklet entitled "Neutrality," in which the neutral position of Jehovah's Witnesses to worldly governments is explained.

On November 6, 1942, the local board classified petitioner in I–A (see Ex. 8) because the records of the Selective Service System showed that the Director of Selective Service had been advised by

the Watchtower Society that petitioner was no longer entitled to be listed as a person entitled to classification as a minister of religion (see *supra*, pp. 44–45) (Ex. 44). Petitioner took an appeal (Ex. 8) and on November 12, 1942, he submitted a letter to the appeal board restating his claim to classification as a minister of religion (Ex. 41–42). On December 10, 1942, the board of appeal declined to classify petitioner as a minister of religion (Ex. 8) and it referred his file to the Department of Justice for a hearing on petitioner's claim that he is conscientiously opposed to war. The Hearing Officer recommended that petitioner be classified IV–E as a conscientious objector and on May 3, 1943, the board of appeal so classified petitioner (see Ex. 8).

On May 14, 1943, petitioner requested the local board to reopen his classification and in support of the application he submitted four affidavits by persons who affirmed that they had known petitioner for either "several" or "many" months and that they knew that he was an ordained minister of religion (Ex. 54–59). In a letter to the local board, petitioner explained that his name had been removed from the list of ministers recognized by the sect and the Selective Service System because, "For a time in the fall of 1941, I did not get to engage my full time as an ordained minister of Jehovah's Witnesses for reasons beyond my control. When it was necessary to revise the official list in December 1941, my

name was not included on the list but very shortly thereafter I returned to full time service of the preaching of the good news of God's Kingdom and have continued in unbroken service since that time." (Ex. 54.) On June 1, 1943, the local board unanimously declined to reopen the classification on the ground that the additional information submitted by petitioner did not warrant it (Ex. 60).

In the meantime petitioner requested the national office of the Selective Service System to intervene in his case (Ex. 62–65). The Director of Selective Service caused petitioner's selective service file to be forwarded to the national office (see Ex. 67–69) to determine whether the Director would take an appeal to the President on petitioner's behalf. After having "carefully reviewed the registrant's classification," national headquarters concluded that an appeal to the President was not necessary "in the national interest or to avoid an injustice" (Ex. 70). A similar request to the State Director of Selective Service thereafter also was denied (Ex. 76–78).

These facts, in our view, furnish ample foundation for the refusal of the board of appeal to classify petitioner IV–D. Among other things, they show (1) that petitioner admittedly furnished to the boards false information concerning the duration of his alleged activities as a full-time minister and (2) that he furnished no evidence from the Watchtower Society showing that at some

time after petitioner's name was removed from the list of ministers, at the society's request, he was restored to status by the society.

As we have shown, when petitioner registered with his local board, in October 1942, he submitted considerable information, including documents from the Watchtower Bible and Tract Society, to the effect that he had been a minister of religion since 1938. In his letter of October 10, 1942 (Ex. 33–36), petitioner stated that from 1938 to 1940 he had been a part-time minister and that from 1940 on he "entered into the full time service of the Lord." However, when the local board proceeded to classify petitioner, it found that although he originally had been listed as a minister, his name had been removed from the list as of January 1, 1942, more than ten months before petitioner registered with the local board (see Ex. 44). In instructions issued to all local boards[19] the Director of Selective Service had advised the boards that certain names, including petitioner's, were removed from the list "upon information received from the Watchtower Bible

[19] The instructions were contained in Local Board Release No. 100, issued February 20, 1942 (see Local Board Memoranda, Government Printing Office, 1945). The Director of Selective Service summarized the practice concerning the addition of names to the list and the deletion of names from the list. The memorandum was accompanied by a list of registrants, including petitioner, whose names were removed from

and Tract Society, on or about January 8, 1942."

Thus, it is plain that petitioner's representation that he had been a full-time minister beginning in 1940 and continuing through October 1942,

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the official list as of January 1, 1942. The text of the memorandum is as follows:

"1. Under date of June 25, 1941, we forwarded to all State Directors a list of Jehovah's Witnesses known as members of the 'Bethel Family' and as 'Pioneers,' to which reference was made in National Headquarters Opinion No. 14. That list, forwarded with Memorandum to All State Directors (I–170), was not forwarded to local boards, but the agencies of the Selective Service System were notified by State Headquarters that information with respect to any names claimed to be contained on such list was available through State Headquarters for Selective Service.

"2. Subsequent to June 25, 1941, application was made by the Watchtower Bible and Tract Society, publishers for Jehovah's Witnesses, that certain names be added to the list of June 25. Between June 25, 1941, and December 31, 1941, 25 names were added to the list, and the State Headquarters and local boards concerned were notified by letter from this office.

"3. Since June 25, 1941, and up to and including December 31, 1941, the names of a number of registrants were subject to deletion from this official list, and the deletion was made, upon information received from the Watchtower Bible and Tract Society, on or about January 8, 1942. We attach hereto for your information, a complete list of those persons whose names were contained on the original list of June 25, 1941, or were added to such list prior to December 31, 1941, but which have been eliminated by this Headquarters from the revised list of members of the Bethel Family and Pioneers of Jehovah's Witnesses.

"4. There is being forwarded to all State Directors of Selective Service the revised official list of members of the 'Bethel Family' and 'Pioneers,' approved and placed on file in this Headquarters on February 20, 1942. This is the cur-

when he registered with the local board, was false. For petitioner's sect, of its own volition, requested that his name be removed from the list of persons it regarded as full-time or substantially full-time ministers of religion.

It was with these facts before it that the board of appeal refused to classify petitioner as a minister. Plainly, the truthfulness of petitioner's representations to the board was properly open to doubt as a result of the conflict between his story and the action of the Watchtower Bible and Tract Society, to which he was responsible. In view of the action of the Watchtower Society, we have difficulty in understanding how the board

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rent edition of the list referred to in National Headquarters Opinion No. 14. This revised list will not be forwarded to local boards, but the agencies of the Selective Service System are advised that this list is on file in State Headquarters, and information concerning those names contained on the revised list will be made available by the State Director of Selective Service.

"5. From time to time in the future, upon application properly made and upon investigation, this Headquarters may determine that the circumstances warrant the adding of the names of certain individuals who are members of Jehovah's Witnesses to the revised official list on file in this office. In such cases, notice of the addition of such names will be given by letter to the State Director and the local board concerned. Likewise, in instances where application has been made and because of the fact that circumstances do not warrant the adding of a name to the revised official list, the State Director and local board concerned will be advised that the application has been denied."

could have reached any other conclusion than it did. It is beyond question that at the time that petitioner was finally classified his name was not on the list of ministers recognized by the society. Since the society had taken affirmative action to delete petitioner's name from the list and, thus, to withdraw its recognition of him as a minister, there was likewise no basis for finding that petitioner's status in his sect was the same as that of a minister in any other religious group and that he should have been classified in IV–D even though his name was not on the list. The board of appeal would have been justified in finding that the society's action constituted a denial of petitioner's status as a minister within the sect. In our view, the action of the society compelled the board to reject petitioner's claim to classification in IV–D.[20] That there was found tion in fact for the board's classification hardly seems debatable.

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[20] The circumstances concerning the absence of petitioner's name from the list differ in this case from cases like *United States ex rel. Hull* v. *Stalter*, 151 F. 2d 633, 638 (C. C. A. 7), where the court regarded the fact that the registrant's name never had been on the list as unpersuasive. This case does not involve a mere failure of the society to place petitioner's name on the list. In this case the society took affirmative steps to withdraw its recognition of petitioner as a minister by causing his name to be removed from the list. The significant fact is the society's action in causing the deletion of petitioner's name from the list, not the mere fact that his name was not on the list.

After the board of appeal had classified petitioner in IV–E as a conscientious objector, petitioner requested the local board in May 1943, to reopen his classification and for the first time he adverted to the absence of his name from the list. His explanation (see Ex. 54) was that in the fall of 1941 he had not devoted his full time to the ministry and that for this reason the society had caused his name to be deleted from the list. His effort to overcome this, however, by suggesting that shortly after December 1941, he returned to the full-time ministry was insufficient. For petitioner failed to explain why his name was not restored to the list by the society during 1942.[21] Even apart from this, however, the application to reopen the classification was inadequate for it failed to present any evidence, other than petitioner's assertion that he was a full-time minister, that petitioner had been restored to status as a full-time minister by the society.[22] Petitioner's assertions were not sup-

[21] We are advised by the Selective Service System that the practice of adding names to the list was not terminated until October 29, 1942. See also, Local Board Release No. 100, *supra*, pp. 50–52.

[22] The application to reopen the classification was accompanied by the affidavits of four persons (Ex. 54–59) who stated that they considered petitioner as a minister of religion. But once it is recognized that all Jehovah's Witnesses are regarded within the sect as ministers of religion, it becomes apparent that these affidavits furnished no basis for finding that petitioner had been restored to status as a full-time minister.

ported by documents from the Watchtower Society showing that the society again recognized him as a minister.

It was for the local board in the exercise of a reasonable discretion to determine whether to reopen petitioner's classification on the ground that new facts were presented which, if true, would justify a change in his classification.[23] Certainly, in the absence of a showing that petitioner had been restored to status by the society, there was no basis for reclassifying petitioner. In our view, the local board properly declined to reopen.

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[23] Section 626.2 (a) of the Selective Service Regulations provides:

"The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any interested party in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which; if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (Form 150) unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control."

That it did not act arbitrarily seems not open to question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SEPTEMBER 1946.

APPENDIX A

Statutory Provisions Involved

The Selective Training and Service Act of 1940 as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; August 18, 1941, c. 362, 55 Stat. 626; December 20, 1941, c. 602, 55 Stat. 844; November 13, 1942, c. 638, 56 Stat. 1018, 50 U. S. C. Appendix 301–318) provided, in part, as follows:

> Sec. 5. * * * (g) Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction. Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with

the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10. (a) The President is authorized (1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the provisions of this Act. There shall be created one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and the District of Columbia. Each local board shall consist of three or more members to be appointed by the President, from recommendations made by the respective Governors or comparable executive officials. No member of any such local board shall be a member of the land or naval forces of the United States, but each member of any such local board shall be a civilian who is a citizen of the United States residing in the country or political subdivision corresponding thereto in which such local board has jurisdiction under rules and regulations prescribed by the President. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in

accordance with such rules and regulations as the President may prescribe. * * *

* * * * *

SEC. 11. Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court

of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act.

APPENDIX B

SELECTIVE SERVICE REGULATIONS

605.51 *Forms made part of regulations.*—All forms and revisions thereof referred to in these or any new or additional regulations, or in any amendment to these or such new or additional regulations, whether heretofore or hereafter adopted, and all forms and revisions thereof heretofore or hereafter prescribed by the Director of Selective Service shall be and become a part of these regulations in the same manner as if each form, each provision therein, and each revision thereof were set forth herein in full. Whenever in any form or the instructions printed thereon, whether heretofore or hereafter adopted or prescribed, any person shall be instructed or required to perform any act in connection therewith, such person is hereby charged with the duty of promptly and completely complying with such instruction or requirement. (6 F. R. 6834.)

* * * * *

621.1 *Mailing questionnaires.*—(a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return. (6 F. R. 6606.)

* * * * *

621.3 *Special Form for Conscientious Objector.*—A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objectors (Form 47) which, when filed, shall become a part of his Selective Service Questionnaire (Form 40). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (Form 47). (6 F. R. 6606.)

* * * * *

622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

* * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (6 F. R. 6610.)

* * * * *

622.51 *Class IV–E: Conscientious objector available for, assigned to, or released from work of national importance.*—(a) In Class IV–E shall

be placed every registrant who would have been classified in Class I–A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to both combatant and noncombatant military service. (7 F. R. 6517.)

* * * * *

629.1 *Who will be examined.*—(a) Every registrant, before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless (1) he signs a Request for Immediate Induction (Form 219) or (2) he is a delinquent, * * *. (9 F. R. 400.)

629.2 *Order to report for preinduction physical examination.*—(a) In accordance with instructions of the Director of Selective Service, the State Director of Selective Service will issue to each local board a Call—Preinduction Physical Examination (Form 224)—specifying thereon the number of specified registrants to be delivered for preinduction physical examination and the time and place fixed for such delivery.

(b) The local board shall mail an Order to Report—Preinduction Physical Examination (Form 215) to a sufficient number of registrants who have been classified in Class I–A or Class I–A–O under the provisions of section 623.21 to fill each Call—Preinduction Physical Examination (Form 224) which it receives. In filling such calls, the local board, as far as practicable, shall first select volunteers, then nonfathers, and finally fathers, and within each group shall make such selections in sequence of order numbers with-

out regard to whether the registrant has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken.

(c) The local board shall also mail an Order to Report—Preinduction Physical Examination (Form 215) to each registrant classified in Class IV–E when his order number is reached (without regard to whether he has requested or will request a personal appearance before the local board and without regard to whether an appeal has been or will be taken) in the process of ordering Class I–A and Class I–A–O registrants to report for preinduction physical examination under the provisions of paragraph (b) of this section.

(d) The local board may also mail an Order to Report—Preinduction Physical Examination (Form 215) to any registrant (1) who is classified in a class other than Class I–A, Class I–A–O, or Class IV–E, if it determines that his induction will shortly occur, or (2) when directed to do so by the Director of Selective Service or the State Director of Selective Service.

(e) At the time the local board prepares the original Order to Report—Preinduction Physical Examination (Form 215), it shall make a copy of such form and shall file the copy in the registrant's Cover Sheet (Form 53). (9 F. R. 400.)

* * * * *

629.32 *Mailing Certificate of Fitness to registrant accepted or rejected.*—When a Certificate of Fitness (Form 218) indicates that a registrant has been found acceptable for general military service or acceptable for limited military service

or that a registrant has been rejected, the local board shall immediately mail the original of such certificate to the registrant and shall record the date of mailing of such Certificate of Fitness (Form 218) on the registrant's Selective Service Questionnaire (Form 40). (9 F. R. 7494.)

* * * * *

652.1 *Report of conscientious objector to Director of Selective Service.*—(a) When a registrant is classified in Class IV–E and his classification is not under consideration on appearance, reopening, or appeal, and the time in which he is entitled to request an appearance or take an appeal has expired, and his order number is reached in the process of selecting Class I–A and Class I–A–O registrants to report for induction, the local board shall immediately notify the Director of Selective Service on Conscientious Objector Report (Form 48) that the registrant is available for assignment to work of national importance under civilian direction. (9 F. R. 439.)

652.2 *Assignment by Director of Selective Service.*—(a) The Director of Selective Service, upon receipt of (1) the Conscientious Objector Report (Form 48) for a registrant or (2) information from the land or naval forces that a registrant who has been inducted into the land or naval forces will be discharged because of conscientious objections which make him unadaptable to military service, shall assign the registrant to a camp. Such assignment will be made on an Assignment to Work of National Importance (Form 49), which shall be made out in triplicate. The original and one copy will be mailed to the State Director of Selective Service, who shall for-

ward the original to the local board designated therein and file the copy. If the Assignment to Work of National Importance (Form 49) is sent to a local board other than the registrant's local board, the registrant's local board will be notified of such action so that appropriate notations may be made in its records. (7 F. R. 4271.)

* * * * *

.652.11 *Preparation and distribution of Order to Report; delinquency of IV–E registrants.*— (a) Upon receipt of an Assignment to Work of National Importance (Form 49) for a registrant, the local board shall prepare six copies of an Order to Report for Work of National Importance (Form 50). The local board shall then proceed as follows:

(1) In the case of a registrant classified in Class IV–E: Mail the original of the Order to Report for Work of National Importance (Form 50) to the registrant at least 10 days before the date set for him to report. At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with the Original and the First Copy of the registrant's Report of Physical Examination and Induction (Form 221), to the camp directors, and retain the Second Copy of the registrant's Report of Physical Examination and Induction (Form 221) in the registrant's Cover Sheet (Form 53).

(2) In the case of a registrant discharged from the land or naval forces because of conscientious objections which make him unadaptable for military service:

Mail or deliver to the registrant before the time set for him to report, the original of the Order to Report for Work of National Importance (Form 50). At the time the registrant leaves the local board for the camp, mail the remaining five copies of the Order to Report for Work of National Importance (Form 50), together with a letter explaining the circumstances under which the registrant was ordered to report for work of national importance, to the camp director at such camp. No other records shall be forwarded to the camp director with such registrant.

When an Order to Report for Work of National Importance (Form 50) is mailed or delivered to a registrant as hereinbefore provided, it shall be his duty to comply therewith, to report to the camp at the time and place designated therein, and to thereafter perform work of national importance under civilian direction for the period, at the place, and in the manner provided by law. (9 F. R. 439.)

* * * * *

652.12 *Transportation to camp.*—(a) When a registrant in Class IV-E reports to the local board for transportation to a camp for work of national importance under civilian direction, the local board shall prepare the necessary Government Requests for Transportation (Standard Form No. 1030) and Government Request for Meals and Lodgings for Civilian Registrants (Form 256) for use by the registrant between the local board and the camp. Except as otherwise provided herein, the local board will follow the same procedure in delivering the registrant to work of national importance under civilian di-

rection as is followed in the case of a registrant delivered for induction into the land or naval forces. (7 F. R. 112.)

* * * * *

652.13 *Jurisdiction of local board while registrant is engaged in work of national importance.*—A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. Such registrant after he has left the local board in accordance with section 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status. (7 F. R. 112.)

* * * * *

653.1 *Work projects.*—(a) The Director of Selective Service is authorized to establish, designate, or determine work of national importance under civilian direction. He may establish, designate, or determine, by an appropriate order, projects which he deems to be work of national importance. Such projects will be identified by number and may be referred to as "civilian public service camps."

(b) Each work project will be under the civilian direction of the United States Department of Agriculture, United States Department of the Interior, or such other Federal, State, or local governmental or private agency as may be

designated by the Director of Selective Service. Each such agency will hereinafter be referred to as the "technical agency."

(c) The responsibility and authority for supervision and control over all projects is vested in the Director of Selective Service. (7 F. R. 247, 654.)

653.2 *Camps.*—(a) The Director of Selective Service may arrange for the establishment of a camp at any project designated as work of national importance under civilian direction.

(b) Government-operated camps may be established in which the work of national importance and camp operations will both be under the civilian direction of a technical agency using funds provided by the Selective Service System and operating under such camp rules as may be prescribed by the Director of Selective Service.

(c) The Director of Selective Service may authorize the National Service Board for Religious Objectors, a voluntary unincorporated association of religious organizations, to operate camps. The work project for assignees of such camps will be under the civilian direction of a technical agency. Such camps and work projects shall be operated under such camp rules as may be prescribed by the Director of Selective Service. (7 F. R. 248; 9 F. R. 6207.)

* * * * *

653.5 *Communications concerning assignees.*—In no event will the camp director communicate with the local board or the State Director of Selective Service concerning assignees, but all such communications shall be directed to the Director

of Selective Service, Washington, D. C. (7 F. R. 248.)

* * * * *

653.11 *Reception at camps.*[1]—(a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

[1] See Appendix C, *infra*, pp. 75–80.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(d) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100). (9 F. R. 1416, 6207.)

653.12 *Duties.*—Assignees shall report to the camp to which they are assigned; remain therein until released or transferred elsewhere by proper authority, except when performing assigned duties or on authorized missions or leave outside of camp; perform their assigned duties promptly and efficiently; keep their persons, clothing, equipment, and quarters neat and clean; conserve and protect Government property; conduct themselves both in and outside of the camp so as to bring no discredit to the individual or the organization; and comply with such camp rules as may be prescribed or such directions as may be issued from

time to time by the Director of Selective Service. (8 F. R. 4291.)

* * * * *

691.17 *Discipline.*—(a) An assignee who fails to perform the duties outlined in § 653.12 or whose conduct amounts to a violation of local, State, or Federal criminal statutes or to violation of these regulations or camp rules issued under the authority of these regulations, or to a violation of furlough, liberty, or leave regulations, will be subject to such restriction of privileges, extra duty, reclassification under the Selective Service Regulations, or prosecution under the Selective Training and Service Act of 1940, as amended, as the case may warrant.

* * * * *

(c) If, after reporting to camp, an assignee departs or absents himself from the camp without authority, the Director of Selective Service will be notified not later than the 11th day following such departure or absence. The Director of Selective Service may take the necessary steps to report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended. In addition, forfeiture of 3 days of furlough time for each day of unauthorized absence is mandatory.

(d) Refusal to work or perform other assigned duties, counseling or inciting others to refuse to work or perform assigned duties, or failure to abide by the rules and regulations promulgated by the camp director or the Director of Selective Service constitutes a violation of these regulations. A full and immediate report of any viola-

tion of such rules and these regulations will be made to the Director of Selective Service through regular channels. If the reported conduct indicates that the assignee may have been improperly classified, the Director of Selective Service may take the necessary steps to submit the information to the assignee's local board with a request that the assignee's case be reopened and his classification considered anew under the Selective Service Regulations or the Director of Selective Service may report the assignee to the proper United States Attorney as a violator of the Selective Training and Service Act of 1940, as amended. (9 F. R. 4862.)

* * * * *

APPENDIX C

DECEMBER 14, 1945.

The Honorable TOM C. CLARK,
The Attorney General,
Department of Justice, Washington, D.C.

(Attention: Mr. Irving Shapiro)

DEAR SIR: In response to your request that you be furnished the historical background of paragraph (c) of section 653.11 of the Selective Service Regulations, you are advised as follows:

From March 16, 1942, until February 2, 1944, the mentioned paragraph (c) read as follows:

> If the assignee indicates that his physical condition has changed since his final type physical examination for registrants in Class IV–E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service will be retained in the camp or hospitalized when necessary.

The above language was provided by Amendment No. 40, effective March 16, 1942 (7 F. R. 2093).

During the period between March 16, 1942, and January 10, 1944, there was no procedure for a preinduction physical examination for registrants inducted into the armed forces. By Amendment No. 29, effective March 16, 1942 (7 F. R. 2091),

the previous procedure of giving a physical examination by the armed forces prior to induction was discontinued. After March 16, 1942, registrants were forwarded to the induction station for their final armed forces physical examination, and if found acceptable by the armed forces, inducted at that time and simultaneously made members of the enlisted reserve and given orders to report seven (7) days later at a reception center.

Section 5 of Public Law 197, 78th Congress, approved December 5, 1943, made specific mandatory provisions for preinduction physical examinations for individuals.[2] This was translated administratively into a plan of mass preinduction examinations.

By Amendment No. 200 (9 F. R. 400–442), effective January 10, 1944, the present procedure for preinduction physical examination was estab-

[2] The statute provided in this respect as follows:

"Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I–A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

lished. Section 629.1 of Amendment No. 200 contained the following provision:

> (a) Every registrant before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless; (1) he signs a Request for Immediate Induction (Form 219), or (2) he is delinquent. * * *

The procedure for a preinduction physical examination by the armed forces was operative for conscientious objectors as well as registrants to be inducted into the armed forces. As a consequence of the new preinduction physical examination procedure, section 653.11 was amended by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, to read as follows:

> (a) When the assignee has reported to camp, the camp director shall complete the Order to Report for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).
>
> (b) The camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for

work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

(c) Upon receiving notice that a registrant has been accepted for work of national importance, the local board shall not change his classification but shall note the fact of his acceptance for such work in the Classification Record (Form 100).

(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service.

The language of the quoted Amendment No. 210 makes no provision for a physical examination of assignees when received at camps, and no such examination was therefore required. However, it was the practice at the camps to examine assignees in order to determine whether there had been any change in their physical condition since the preinduction physical examination.

Taking cognizance of the prevailing practice in the camps to examine assignees when received, Amendment No. 236 (9 F. R. 5207), effective June

7, 1944, amended paragraphs (b) and (c) of section 653.11 to read as follows:

(b) As soon as possible after the assignee has reported to camp, the camp physician shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

(c) Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b) of this section, the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

Paragraphs (b) and (c) of section 653.11 were amended to read in their present form by Amendment No. 290 (10 F. R. 2286), effective March 1, 1945.

We trust that the above information answers your inquiry.

For the Director:

(S) SMYSER F. NAGLE,
1st Lieutenant, JAGD,
Assistant Chief, Legal Division.

APPENDIX D

Executive Order 8675, 6 Fed. Reg. 831, issued February 6, 1941, and authorizing the Director of Selective Service to establish the Civilian Public Service Camp System provides, as follows:

By virtue of the authority vested in me by the Selective Training and Service Act of 1940 (Pub. No. 783, 76th Cong.), it is hereby ordered as follows:

1. The Director of Selective Service, hereinafter called the Director, is authorized to establish, designate, or determine work of national importance under civilian direction to which may be assigned persons found under section 5 (g) of the Selective Training and Service Act of 1940 to be conscientiously opposed to participation in combatant and non-combatant training and service in the land or naval forces of the United States.

2. The Director shall make the necessary assignments to such work, shall determine the agencies, organizations, or individuals that may provide civilian direction thereof, and shall have general supervision and control over such work.

3. To the extent that he may deem necessary to carry out the provisions of this order, the Director may utilize the services of the Departments, officers, and agents of the United States; accept the services of officers and agents of the several states, territories, and the District of Columbia, and the subdivisions thereof; and accept voluntary services of private organizations and individuals; and may obtain, by par-

chase, loan, or gift, equipment and supplies from Federal and other public agencies and private organizations and individuals, with or without advertising or formal contract.

4. The Director is authorized to prescribe such rules and regulations as may be necessary to carry out the provisions of this order.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
February 6, 1941.

APPENDIX E

Order No. 57 of the Director of Selective Service (7 Fed. Reg. 7589) establishing Civilian Public Service Camp No. 57, to which petitioner was assigned, and providing for the performance of work of national importance at the camp provides, as follows:

HILL CITY PROJECT

ESTABLISHMENT FOR CONSCIENTIOUS OBJECTORS

I, Lewis B. Hershey, Director of Selective Service, in accordance with the provisions of section 5 (g) of the Selective Training and Service Act of 1940 (54 Stat. 885) and pursuant to authorization and direction contained in Executive Order No. 8675 dated February 6, 1941, hereby designate the Hill City Project to be work of national importance, to be known as Civilian Public Service Camp No. 57. Said camp, located near Hill City, Pennington County, South Dakota, will be the base of operations for reclamation work in the State of South Dakota, and registrants under the Selective Training and Service Act of 1940, who have been classified by their local boards as conscientious objectors to both combatant and noncombatant military service and have been placed in Class IV–E, may be assigned to said camp in lieu of their induction for military service.

The work to be undertaken by the men assigned to Civilian Public Service Camp No. 57 will consist of the reclamation of

bridges, impounding dam, minor roads, clearing reservoir, and the fighting of forest fires, and shall be under the technical direction of the Bureau of Reclamation of the Department of the Interior insofar as concerns the planning and direction of the work program. The camp, insofar as camp management is concerned, will be under the direction of approved representatives of the National Service Board for Religious Objectors. Men shall be assigned to and retained in camp in accordance with the provisions of the Selective Training and Service Act of 1940 and regulations and orders promulgated thereunder. Administrative and directive control shall be under the Selective Service System through the Camp Operations Division of National Selective Service Headquarters.

LEWIS B. HERSHEY,
Director.

SEPTEMBER 23, 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES

Nos. 23 AND 86.—OCTOBER TERM, 1946.

Taze Hamrick Gibson, Petitioner, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
George William Dodez, Petitioner. v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals to the Sixth Circuit.

[December 23, 1946.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

These cases carry forward another step the sequence in decision represented by *Falbo, Billings, Estep* and *Smith*.[1] Each petitioner has been convicted for violating § 11 of the Selective Service and Training Act (54 Stat. 894, 50 U. S. C. App. § 311), Dodez for failing to report for work of national importance after being ordered to do so and Gibson for having unlawfully deserted the camp to which he had been assigned for such work.[2]

[1] *Falbo* v. *United States*, 320 U. S. 549; *Billings* v. *Truesdell*, 321 U. S. 542; *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*

[2] Section 11 provides, in part: "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five

in each instance the conviction was sustained on appeal [3] and certiorari was granted because of the importance of the questions presented for the administration of the Act. No. 23, 326 U. S. 708, restored to the docket for reargument before a full bench, 328 U. S. —; No. 86, 328 U. S. —.

The principal issues relate to the time of completing the administrative selective process and the effect in each case of what was done in this respect upon the petitioner's right to make defense in the criminal proceedings on various grounds going to the validity of the classification.

In both cases tendered defenses of this character were excluded in the trial court and the exclusion was sustained on appeal. The effect was, in Gibson's case, to rule that although he had completed the administrative process by reporting to the camp, pursuant to the requirement of the *Falbo* decision, nevertheless his remedy, if any, on account of the alleged misclassification was by habeas corpus, not by defense in the criminal cause. 149 F. 2d 751. In Dodez' case it was held that by refusing to report for service at the camp he had failed to exhaust his administrative remedies and therefore under the *Falbo* doctrine he could not question his classification in the criminal suit. 154 F. 2d 637.[4]

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years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

Section 652.11 (a) of the Regulations imposes the duty on persons classified IV–E to comply with the order to report for work of national importance; and by § 653.12 assignees are required to report to the camp to which they are assigned and to remain therein until released or transferred elsewhere by proper authority, except when on authorized missions or leave.

[3] 149 F. 2d 751 (C. C. A. 8); 154 F. 2d 637 (C. C. A. 6).

[4] Apparently in both cases the important changes in the applicable regulations made after the *Falbo* decision were not called to the attention of the trial courts or the Circuit Courts of Appeals.

I

Both petitioners are Jehovah's Witnesses. Each has claimed consistently since the time of his registration that he is a minister of religion and therefore exempt from training and service under the Act.[5] Each was denied this classification (IV–D), being classified instead as a conscientious objector (IV–E).[6] Administrative appeals were exhausted. Pursuant to the classifications given and the applicable statutory provisions and regulations, Dodez and Gibson were assigned to work of national importance and ordered to report for such work at designated camps.

Dodez refused to go to the camp. But Gibson, thinking the *Falbo* decision required him to report there in order to exhaust his administrative remedies, went to the camp, remained for five days, and then departed without leave. It is undisputed that he intended at no time to submit to the camp's jurisdiction or authority and that he at all times made this intent clear. Everything he did was done solely to make sure that the administrative process had been finished and with a view to avoiding the barrier Falbo encountered in his trial when he sought to question his classification.

Obviously the petitioners have sought to reach the same point, namely, the place at which the selective process is exhausted administratively, but have differed concerning its exact location. Dodez maintains that the

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[5] The exemption is provided by § 5 (d) of the Act, 54 Stat. 885, 888, as follows: "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of the enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

[6] Pursuant to § 5 (g) of the Act, which provides that persons so classified shall be assigned to noncombatant service or, if conscientiously opposed to this, then to "work of national importance under civilian direction."

point was reached, under the applicable regulations,[7] when his preinduction physical examination had been given and he was found acceptable for service by the Selective Service system. This was on February 21, 1944, two months prior to the date (April 21, 1944) when he was ordered to report for work and refused to go.

On the other hand, Gibson argues that until the preliminaries to actual service, including physical examination, were completed at the camp, he was not foreclosed by going through with them from exercising his choice not to submit to the camp's jurisdiction, cf. *Billings* v. *Truesdell*, 321 U. S. 542, or, upon doing so, from asserting the invalidity of his classification in a criminal trial either for failing to report for service or for desertion from the camp. Cf. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.* Clearly, on the facts and the issues, the question as to Dodez, like that in Falbo's case, is whether he went far enough to exhaust the administrative process; while as to Gibson it is said that he went too far, that is, beyond the point of completing that process, and that this cut off the right of defense concededly available to him at that point.

II

If these cases were controlled in all respects by the regulations effective when Falbo's case was decided, Dodez would seem clearly to fall within the decision's proscription. The Court there said: "Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. The connected series of steps into the national service which begins with registration with the

[7] See text Part II infra at note 19; also note 13.

local board does not end until the registrant is accepted by the army, navy or civilian public service camp. Thus a board order to report is no more than a necessary intermediate step in a united and continuous process designed to raise an army speedily and efficiently." 320 U. S. at 533. Since acceptability for service was not finally determined under the regulations then applicable until the registrant had reached camp, had there undergone or waived the specified physical examinations, and thereupon had been found acceptable,[8] and since Falbo had not taken those steps, the Court held he was not entitled to question his classification and therefore sustained his conviction.

However, intermediate the *Falbo* decision and issuance of the order to Dodez to report, the regulations governing the procedure relating to selection for service were changed and in a manner which Dodez says relieved him from the necessity of going to the camp in order to complete the administrative process. The Government now concedes, we think properly,[9] that Dodez is right in this view.

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[8] At that time § 653.11 (c) of the Selective Service Regulations provided: "If the assignee indicates that his physical condition has changed since his final type physical examination for registrants in Class IV-E, the camp physician shall examine him with reference thereto. If the assignee is not accepted for work of national importance, the Camp Director will indicate the reason therefor, and the assignee, pending instructions from the Director of Selective Service will be retained in the camp or hospitalized when necessary." Cf. note 10.

This provision, effective by Amendment No. 40 on March 16, 1942 (7 F. R. 2093), was eliminated entirely by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, a little more than two months prior to the date specified for Dodez to report for work, namely, April 21, 1944; but was restored in modified form on June 7, 1944, by Amendment No. 236 (9 F. R. 6207), nearly two months before Gibson was ordered to report on August 21 of that year.

[9] A confession of error on the part of the United States "does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible

It is not necessary to review in detail the regulations which were governing in Falbo's case, since they are not controlling in either of the present ones. Although it is now argued that the Court misconceived their effect,[10] we need only to note that it was within the registrant's power to secure a physical examination by the camp physician by indicating a change in his physical condition, it could not be known in advance in any case whether he would demand it, and until this was determined it could not be known finally and irrevocably whether he would be "accepted for work of national importance."[11] The decision therefore correctly ruled that "the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp" and that the board's order to report there for service was "no more than a necessary intermediate step" in the continuous selective process, which was not ended until the last possibility for rejection had been exhausted. Under those regulations there was no final and conclusive acceptance for service until after those procedures at the camp were completed.

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error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Young* v. *United States*, 315 U. S. 257, 258–259.

[10] The contention is that § 653.11 (c) of the Regulations as it then stood, see note 8, provided for physical examination at the camp and possible rejection there only if the registrant on reporting indicated a change in his physical condition and that this was effective only as to persons sustaining such a change, not to others, of whom Falbo was one. The argument assumes that the registrant's actual condition, not the possibility that a change might occur and be found in any case, was controlling not only to determine the outcome of the examination, but to foreclose the possibility that change might be "indicated" and, in that event, final determination of acceptability would be made after the examination.

[11] The Regulation clearly contemplated that upon receipt of such instructions from the Director of Selective Service, the registrant might be rejected or released.

It was exactly in this respect, however, that the changes made in the regulations immediately after the *Falbo* decision [12] and shortly prior to issuance of Dodez' order to report, together with still others made later but prior to the order to Gibson, were effective. The changes were extensive and important. The altered regulations are lengthy. We therefore give a summary in the margin, noting the more important differences between those applicable to Dodez and those in effect as to Gibson.[13]

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[12] The decision was rendered January 3, 1944. The basic changes in the regulations were made January 10, 1944. See text infra at notes 13-17.

[13] After a registrant has been classified IV-E he is given a preinduction physical examination. Reg. §§ 629.1, 629.2. If found acceptable for service he is issued a certificate of fitness. Reg. § 629.32. Thereafter the local board notifies the Director of Selective Service that the registrant is available for assignment to work of national importance, Reg. § 652.1, and such an assignment is sent to the local board. Upon receipt thereof, the local board issues to the registrant an order to report for work of national importance commanding him to report at a designated time and place. Reg. § 652.12. When the registrant reports, transportation to a camp for work of national importance is furnished, Reg. § 652.12. Thereafter he "is under the jurisdiction of the camp to which he is assigned." The local board then can take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status, Reg. § 652.13.

Upon arrival at the camp the registrant (now called assignee in the regulations) is given a physical examination, although at the time the case of Dodez arose specific provision for such an examination was not made in the regulations. See note 8. It was merely provided that "the camp director shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), place a statement that a registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned." Reg. § 653.11 (b). However, this regulation subsequently was amended in the form applicable to the case of Gibson. See note 28 infra.

It is of some importance to note that the changes affecting both registrants were made in consequence of the enactment of § 5 of Public Law 197, 78th Congress, approved December 5, 1943. 57 Stat. 596, 599, 50 U. S. C. App. § 304a. This required preinduction physical examinations to be given before the registrant was ordered to report for induction and service.[14] Previously he first had been ordered to report for induction, was then given his preinduction examination by the armed forces and, on being found acceptable, was inducted at once.[15] The major changes in the regulations giving effect to § 5 were made on January 10, 1944, one week after the Falbo decision came down, some taking effect on that date,[16] others on February 2d following. These applied to Dodez. Still others not applicable to him but operative as to Gibson took effect on June 7, 1944.[17]

The changed regulations, following out the command of § 5 of Public Act 197, provided for a preinduction physical examination to be given before issuance of the order to report for induction, rather than afterward. Section 629.1

[14] The statute, in so far as is now material, provided: "Any registrant within the categories herein defined when it appears that his induction will shortly occur shall, upon request, be ordered by his local board in accordance with schedules authorized by the Secretary of War, the Secretary of the Navy, and the Director of Selective Service, to any regularly established induction station for a preinduction physical examination, subject to reexaminations.

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order."

[15] Compare the procedure outlined in *Billings* v. *Truesdell*, 321 U. S. 542.

[16] See notes 18, 19, infra, and text for the principal changes.

[17] These are noted specifically infra at note 28 and text.

of Amendment No. 200 (9 F. R. 400–442), effective January 10, 1944.[18] This was the basic amendment. It applied to all registrants subject to call for service, including those classified IV–E. Moreover, by Amendment No. 210 (9 F. R. 1416), effective February 2, 1944, § 653.11 of the Regulations applicable to men so classified was changed to eliminate the previously effective paragraph (c) providing for physical examination by the camp physician on indication of changed condition and consequent possible rejection at the camp. Instead the amended regulation stated simply that (a) when the "assignee" had reported to the camp, the camp director should "*complete the Order to Report* for Work of National Importance (Form 50)"; and (b) place, as specified, on the assignee's papers, "a statement that the registrant *is accepted*" for work at the designated camp, stating also the date and place of acceptance; (c) the local board, "upon receiving notice that a registrant *has been accepted for work*," should not "change his classification but shall note the fact *of his acceptance*" on Form 100; and (d), if the assignee failed to report when required, the camp director was to notify the Director of Selective Service.[19] (Emphasis added.)

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[18] Pertinently the basic regulation provided: "Every registrant before he is ordered to report for induction, shall be given a preinduction physical examination under the provisions of this part unless; (1) he signs a Request for Immediate Induction (Form 219), or (2) he is delinquent. . . ."

[19] Because § 653.11 as changed by Amendment No. 210 is crucial in Dodez' case, the exact language is quoted: "(a) When the assignee has reported to camp, the camp director *shall complete the Order to Report* for Work of National Importance (Form 50). Four copies of the completed Order to Report for Work of National Importance (Form 50) shall be sent to the Director of Selective Service; one copy will be retained by the camp director. The Director of Selective Service will forward two copies of the Order to Report for Work of National Importance (Form 50) to the appropriate State Director of

The effect of the statute and the amended regulation was to place the order to report for service nearer the end of the administrative process than it had been previously, so far as concerned the power of the registrant to take action which might result in his rejection. The elimination of the provision permitting medical examination at the camp, by Amendment No. 210, removed any chance the registrant formerly had to secure rejection by demanding examination there, and left to be performed at the camp only the formal entries of "completing the order to report" and noting the fact, time and place of "acceptance" upon the assignee's papers, together with the duties of notifying the local board of acceptance or the Director of Selective Service of failure to report.

Although the amended regulations thus speak of "completing the Order to Report" and placing on his papers "a statement that a registrant is accepted," we agree that

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Selective Service, who will retain one copy for his files and mail the other copy to the local board for filing in the registrant's Cover Sheet (Form 53).

"(b) *The camp director shall*, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), *place a statement that a registrant is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service.

"(c) Upon receiving notice that a registrant *has been accepted* for work of national importance, the local board shall not change his classification *but shall note the fact of his acceptance* for such work in the Classification Record (Form 100).

"(d) In the event an assignee does not report to the camp at the time prescribed in his Order to Report for Work of National Importance (Form 50) or pursuant to the instructions of the local board, the camp director will report such fact to the Director of Selective Service." (Emphasis added.)

these were only formal matters to be performed by camp officials, and left nothing to be done by them or by the applicant after reaching the camp which might result in his being rejected or released from the duty to remain and perform the further duties imposed on him. To construe the regulations otherwise would be to force the registrant not only to perform all requirements affording possibility of relief but also to go through with purely formal steps to be taken by camp officials offering no such possibility. Exacting this would stretch the requirement of exhausting the administrative process beyond any reason supporting it. Cf. *Levers* v. *Anderson*, 326 U. S. 219. And, as appears from Gibson's experience, by going through with those formalities Dodez would have found himself confronted with the Government's contention that he had gone too far.

We hold therefore, in accordance with Dodez' view and the Government's concession, that he was not required to report to the camp, under the Regulations effective when his order to report became operative, in order to complete the administrative process; and that he therefore was not foreclosed by the *Falbo* decision from making any defense open to him in his criminal trial under the statute or the Constitution aside from the effect of that decision. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*; cf. *Billings* v. *Truesdell*, 321 U. S. 542.

This view requires reversal of the judgment in No. 86 and remanding the cause to the District Court for a further trial. Dodez insists however that we should go further and determine the case finally upon the merits. He urges that the evidence properly tendered and admissible upon the excluded defenses, as well as that adduced,[20] would support no other verdict than one of

[20] The trial court permitted Dodez to introduce *de novo* evidence intended to show that as of the time of the trial he was a minister. But the court, over objection, declined to allow this evidence to go to the jury.

acquittal and that therefore the trial court should have sustained his motion to dismiss the cause.[21] Accordingly he asks for a judgment here directing that such relief be given.

In the *Estep* and *Smith* cases, after holding that the petitioners had been wrongfully denied opportunity to defend by attacking the validity of their classifications, this Court reversed the convictions and remanded the causes for new trials, stating: "We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case." 327 U. S. at 125. Dodez' situation is identical, in this respect, with those of Estep and Smith.[22] Accordingly we remand the cause, as was done in the *Smith* and *Estep* cases, for further proceedings in the trial court, without expressing opinion upon those further issues.

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[21] The question was also raised by motion for a directed verdict, which was overruled.

[22] In case each the tendered defenses were substantially two, namely, (1) that a full and fair hearing had been denied in the selective service proceedings, particularly before the local board; and (2) that the undisputed evidence would sustain no other conclusion than that the registrant was a minister of religion. In each case also evidence was tendered and excluded in the trial court to sustain the first of these defenses. Appropriate determination of that defense would require not only reception and consideration of evidence properly tendered upon the issue, but also in consequence thereof determination of issues of fact, including credibility and inferential conclusions, properly to be made in the trial court rather than by an appellate tribunal. Since issues of credibility also may be involved in determining whether the evidence would support no other conclusion than that the registrant was a minister, that question too is more appropriately determinable in the first instance in the trial court. Moreover, it is not certain that another trial will be had or that the identical issues will be presented if one is held.

III

The Government urges that the conclusion we have accepted for Dodez forces the contrary result in Gibson's case No. 23. The argument, as we have pointed out, is not that Gibson fell short of exhausting the administrative process, for he clearly had done this. It is rather that he went beyond what was required for that purpose, thereby became subject to the camp's jurisdiction, and in doing this irrevocably foreclosed himself from defending against the charge of desertion on the ground that his classification was invalid.

The Government's position is founded upon analogy to the cases which hold that one who has been inducted into the armed forces, although wrongfully, becomes subject to military jurisdiction, is thereafter amenable to its processes,[23] and can secure his release from service or military custody only by resort to habeas corpus.[24]

Applying the analogy, the Government insists that when Gibson went to the camp and there went through the preliminary formalities for becoming a member, he became "inducted" as a camp member, just as one becomes a member of the armed forces by undergoing the induction ceremony, cf. *Billings* v. *Truesdell*, *supra*, even though the induction is in violation of his rights. Thereafter, the argument continues, Gibson became subject to the camp's

[23] See, e. g., In re Morrissey, 137 U. S. 157; In re Miller, 114 Fed. 838; *United States* v. *Reaves*, 126 Fed. 127; In re Carver, 142 Fed. 623; In re Scott, 144 Fed. 79; *Moore* v. *United States*, 159 Fed. 701; *Dillingham* v. *Booker*, 163 Fed. 696; United States ex rel. *Laikund* v. *Williford*, 220 Fed. 291; Ex parte Romano, 251 Fed. 762; Ex parte Tinkoff, 254 Fed. 912; Ex parte Kerekes, 274 Fed. 870. But cf. *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876; Ex parte Beck, 245 Fed. 967. Cf. *Kurtz* v. *Moffitt*, 115 U. S. 487.

[24] See In re Grimely, 137 U. S. 147; Stingle's Case, Fed. Cas. No. 13,458; United States ex rel. *Turner* v. *Wright*, Fed. Cas. No. 16,778. See also cases cited in note 23.

"jurisdiction," just as the wrongfully inducted soldier would become subject to military jurisdiction; and, like the latter, cannot raise the illegality of his induction as a defense to a charge of violating any duty imposed upon inducted members; but must seek his relief, if any, by the writ of habeas corpus. Since the Act and the regulations laid upon camp members a duty to remain and perform the further duties prescribed for them,[25] Gibson's departure without leave amounted to desertion; his defense of wrongful classification is no more open to him than a defense of illegal induction would be open to a wrongfully inducted soldier violating a military order; and his remedy, if any, is to apply for release from the camp through habeas corpus.

The argument is supported by extensive reference to the regulations in force when Gibson was ordered to report, including the changes affecting Dodez and the others which became effective June 7, 1944, by Amendment No. 236 (9 F. R. 6207). The important changes this amendment made were two, namely: (1) to reintroduce into § 653.11, the provision applicable in Falbo's case but eliminated as to Dodez by Amendment No. 210, effective February 2, 1944,[26] for medical examinations to be given at the camp to determine change in condition; and (2) to add to the preexisting requirement for the camp director's noting the fact of acceptance on the registrant's papers [27] the explicit new provision that this should be done "irrespective of the determination which is made as a result of the examination." [28]

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[25] See note 2.

[26] See text at notes 18, 19. Under § 653.11, as reintroduced, the physical examination at the camp was given to all "assignees," regardless of whether they indicated a change in physical condition. Cf. note 8.

[27] Cf. note 19, § 653.11 (b).

[28] The alterations made in § 653.11 by Amendment No. 236 will appear from comparing the text of the section prior to the amend-

The Government also emphasizes two other regulations. One is § 652.12 requiring the local board to provide transportation for registrants reporting to it for transportation to the camp. The other, § 652.13, providing that a Class IV–E registrant *"after he has left the local board in accordance with § 652.12* for work of national importance under civilian direction *is under the jurisdiction of the camp* to which he is assigned." [20] (Emphasis added.)

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ment, see note 19, with the following quoted portions, following the amendment:

"(b) As soon as possible after the assignee has reported to camp, the camp physician *shall give him a physical examination and shall determine whether there has been any change in the assignee's physical or mental condition* since his preinduction physical examination. If a camp physician is not available, the camp director, to the extent that he is capable of doing so, shall, by observing and questioning the assignee, make such determination. The camp physician or the camp director, as the case may be, shall, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), make a record of such determination.

"(c) *Irrespective of the determination which is made as a result of the examination of an assignee made under the provisions of paragraph (b)* of this section, the camp director *shall*, on the bottom of page 4 of the Original and First Copy of the Report of Physical Examination and Induction (Form 221), *place a statement* that a registrant *is accepted* for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement *shall specify the date and place of such acceptance* and shall be signed by the camp director who shall retain the First Copy of the Report of Physical Examination and Induction (Form 221) and shall forward the Original to the Director of Selective Service." Emphasis added.)

The reintroduced provision of § 653.11 became subsection (b) of the amended section and the former subsection (b) became subsection (c) with the added initial provision, "Irrespective of the determination . . . ," etc.

[20] The regulation, § 652.13, reads as follows: "A registrant in Class IV–E who has reported for work of national importance pursuant to this part shall be retained in Class IV–E by the local board. *Such*

The short effect of § 653.11, as altered at the time of Gibson's order to report was to retain the requirements for formal entries of "acceptance" and giving notice, at the camp, which applied to Dodez; to reintroduce the provision for physical examination there; but at the same time to nullify the possibility this presented in Falbo's case for giving relief, by providing that the camp director should note the fact of acceptance "irrespective of the determination made as the result of" this examination.

Taking account of revised § 653.11 as precluding any possibility for securing administrative relief at the camp, the Government regards § 652.13 as marking the precise and crucial line for crossing from the board's jurisdiction into that of the camp, namely, at the point where the registrant begins his journey to the camp. To take this step, it says, is equivalent to the oath in the induction ceremony prescribed for men entering the armed forces, cf. *Billings* v. *Truesdell, supra*; and produces the same consequences for foreclosing the defense of illegal classification, regardless of intention to submit to the camp's jurisdiction, indeed in spite of Gibson's unwavering manifestation of intention not to submit.[30]

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registrant after he has left the local board in accordance with § 652.12 for work of national importance under civilian direction is under the jurisdiction of the camp to which he is assigned. The local board shall take no further steps with regard to such registrant without instructions from the Director of Selective Service, but should report any information to the Director of Selective Service which might affect the registrant's status." (Emphasis added.) 7 F. R. 113.

Section 652.13 was adopted December 24, 1941, became effective February 1, 1942, and therefore was in effect as to Falbo as well as to Estep, Smith, Dodez and Gibson.

[30] The Government does not urge that Gibson waived his rights by submitting to "induction," in the sense of voluntarily surrendering them; it is rather that he acted at his peril in taking steps beyond those required to complete the administrative remedial process, even though he mistakenly thought them necessary for that purpose. The

Much of the argument was devoted to whether, on the basis of the Government's analogy, § 652.13 could be taken to fix the end of the "interval of choice," cf. *Billings* v. *Truesdell*, *supra*, in view of the constantly changing character of the regulations, the absence of any prescribed induction ceremony such as the *Billings* case involved, and the consequent difficulty confronting one seeking to comply with the *Falbo* decision in ascertaining the exact location of such a line.[31] We do not find it necessary to consider the conflicting contentions in this respect, or therefore to scrutinize the regulations with a view to locating such a point. More fundamental considerations are controlling.

We have said that the Government's argument is founded entirely upon analogy, because no case has ruled that one who becomes subject to the "jurisdiction" of a work camp under the Selective Service procedure thereby forfeits his right to defend against a charge of desertion or other breach of duty, on the ground that his classification

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argument is essentially one of forfeiture rather than of waiver. The facts would sustain no implication of intention to submit to "induction" or to surrender any rights.

[31] It is Gibson's position that had he not gone to the civilian public service camp and subjected himself to the physical examination given by the camp physician, see note 29, the courts might subsequently have held that in a prosecution under § 11 he was foreclosed by the *Falbo* doctrine from making the defense that his classification was illegal. He says further that the regulations applicable to Falbo and those applicable to him were so similar that no reasonable person reading them could have determined that under the latter it was not necessary to undergo the physical examination given at the camp in order to complete the administrative process. Indeed, he asserts that in some ways the later regulations were more compelling than those applicable to Falbo, since at the time Falbo was ordered to report the physical examination was required only for those who indicated a change in their physical condition, whereas when he was ordered to report all assignees were required to be given physical examinations. Cf. notes 8, 26.

was invalid. Nor has it been held that his only recourse for release from the camp is by way of habeas corpus. Furthermore, we think there are compelling reasons why the analogy does not hold true.

In the first place, there are obvious and important differences between the two situations which it is sought to connect by the claimed resemblance. Not the least is that in the one instance the person concerned crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights, whereas in the other no such chasm is traversed. The alleged transfer of "jurisdiction" is only from one civilian agency to another, both branches of the Selective Service System, and there is none at all from the authority of the civilian courts as agencies for the enforcement of obligations imposed by the law. There is in fact no change in "jurisdiction" whatsoever, except in the sense that from the time he becomes a camp member the registrant's duties are different and his orders come through different channels of the same agency.

Unlike the man "actually inducted," the person classified IV–E remains a civilian; his duties are not military in character; he is not subject to military discipline or authority; and for violation of duties or orders he cannot be tried by court martial or military tribunal. On the contrary the Selective Service Act expressly provides the same civil penalties and mode of trial for violating duties arising when he enters the camp as for those arising before that time.[32]

There is therefore no such profound change in rights, duties and status as occurs when one crosses the line between civil and military jurisdiction by being "actually inducted" under the rule of *Billings* v. *Truesdell*, *supra*. It was this change and the consequences it entailed together with the statute's command that no one should be

[32] See § 11, note 2 supra.

tried by military or naval court martial in any case arising under the Act until he had been actually inducted,[33] which we there held to require placing the line precisely, not only for exhausting administrative remedies under the *Falbo* rule, but also for marking the point of actual induction at which the registrant's right ends to choose between going forward into the service and incurring the civil liability for breach of that duty.

The person classified as conscientious objector is never confronted with that choice. He is relieved by the Act from any duty to perform military service. He is not threatened with induction. He is in fact farther removed from military status or jurisdiction after he is finally assigned to civilian public service of national importance, and for this reason is rejected for military service, than he was before that time. His choice is not between going into service and taking the civil penalty laid for violating that duty. It is between performing civilian service under civilian authority and incurring the civil penalty for refusing to do so.

Moreover, in the case of one entering the armed forces, the loss of civil rights, including those of recourse to the civil courts other than by way of habeas corpus,[34] results altogether by virtue of the change from civilian to military status. The reasons underlying those rulings do not apply

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[33] Section 11 of the Selective Training and Service Act reads in part: "No person shall be tried by any military or naval court martial in any case arising under this Act unless such person had been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act." It was held in the *Billings* case that in view of the legislative history Congress could not be presumed "to have restored by the second 'unless' clause in § 11 what it took away by the first 'unless' clause." Section 11 rather indicated "a purpose to vest in the civil courts exclusive jurisdiction over all violations of the Act prior to actual induction." 321 U. S. at 547.

[34] See notes 23, 24, supra, and text.

in the case of one who does not undergo that change, remains at all times a civilian, subject only to civilian duties and to civil penalties for violating them. There is not the same necessity or compulsion in such a case for bringing about forfeiture of civilian rights, including remedies for questioning the validity of the order the registrant is charged with violating. That compulsion arises from the necessity for preventing interruption of military processes by intrusion of the civil courts beyond the essential minimum of keeping open the habeas corpus channel to show that the military authority has exceeded its jurisdiction in dealing with the individual.[35] It is on this foundation that the forfeiture of other civil remedies is held to take place.

But there is no such necessity, or therefore any such foundation for forfeiture, in the case of one classified as a conscientious objector and assigned for work of national importance. Serious as are the consequences of his refusal to perform that work, dealing with such breaches of duty by the civil courts does not involve, in the remotest sense, interruption or interference by civilian authority with military processes or jurisdiction. Entirely wanting therefore is any such foundation for forfeiture of civil rights as exists in the case of one inducted into the armed services. Without such a foundation the analogy dissolves and with it the asserted forfeiture.

This becomes even more clear when it is recalled that one basis for the forfeiture, which the Government has maintained, is that habeas corpus is available for the person classified IV–E and wrongfully denied classification and exemption as a minister of religion. This remedy, it was asserted, originally, is adequate and exclusive, and therefore should be held to foreclose resort to other forms of relief.

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[35] *Ibid.*

But here again the asserted analogy fails. It has been clearly established that the remedy by way of habeas corpus is open to the wrongfully inducted member of the armed forces to secure his release.[36] But at the argument it was conceded that neither the camp director nor other officials of the Selective Service system are authorized to use force to arrest or restrain one who refuses to remain in the camp. And this, it was also admitted, would make doubtful the availability of relief by way of habeas corpus.[37] Indeed it might well be urged that the remedy is not available for one charged with violation of any duty; whether failure to report to the camp, to remain there, or to perform other obligations, since the only compulsion laid upon such a person by the Act or otherwise is the force of the legal command plus the provision for criminal penalty in case of disobedience.

We need not decide this question, however, and we express no opinion upon it. For it is enough to destroy the analogy the Government seeks to draw that the remedy by habeas corpus is an uncertain one. Should it be found unavailable and at the same time we should rule that petitioner's defense could not be made in the criminal proceeding, he would be left entirely without remedy, a result consistent neither with our decision in the cases of *Estep* and *Smith*, *supra*, nor with the statute. No more, we think, is it consistent with the Act or those rulings to foreclose the right of defense upon the basis of uncertainty whether the habeas corpus remedy might be had.

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[36] *Billings* v. *Truesdell*, 321 U. S. 542; and see the authorities cited in note 24, *supra*.

[37] Cf. *Wales* v. *Whitney*, 114 U. S. 564; *Stallings* v. *Splain*, 253 U. S. 339; *McNally* v. *Hill*, 293 U. S. 131, 137–138; *Weber* v. *Squier*, 315 U. S. 810; *Tornello* v. *Hudspeth*, 318 U. S. 792; *Zimmerman* v. *Walker*, 319 U. S. 744; *United States ex rel. Jones* v. *Crystal*, 319 U. S. 755; *United States ex rel. Lynn* v. *Downer*, 322 U. S. 756; *Baker* v. *Hunter*, 323 U. S. 740.

Finally, Congress has provided expressly for enforcing the duty to report to the camp for work and duties arising thereafter through the criminal proceedings and penalties prescribed by § 11. In its view these were adequate for the purpose. Nothing in the section or the statute, in the light of our prior decisions, can be taken to indicate that Congress intended persons charged with violating such duties to be deprived of their rights of defense on the ground of invalid classification, either absolutely should habeas corpus prove unavailable or contingently depending upon how the doubt concerning that remedy's availability might be resolved. The Government concedes that Congress intended some remedy to be available. We know of no way by which this can be assured, in such a case as Gibson's, otherwise than by permitting the defense to be raised in the criminal trial.

The analogy failing, for both of the reasons we have stated, by which it is sought to confine the remedy to habeas corpus, we think the defense has been left open for presentation in this case and should have been allowed. *Estep* v. *United States*, 327 U. S. 114; *Smith* v. *United States*, *ibid.*[28]

Gibson, like Dodez, and for similar reasons, insists that we should dispose of the case upon the merits, by examining and sustaining his defense. The same course should be followed for Gibson in this respect as was directed for Dodez.

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[28] In this case, as in the *Estep* and *Smith* cases, the United States in a criminal prosecution is asking judicial enforcement of a draft board's command or order. In the *Estep* case, though the Act provided that the order of the draft board should be "final," limited judicial review was permitted. Section 11 of the Selective Service and Training Act does not distinguish between one order of a board and another. Provided that he has exhausted his administrative remedies, the registrant who has not been actually inducted into the armed forces may in defense to a criminal prosecution attack a board's order as arbitrary and illegal.

We express no opinion concerning whether a different result might follow for one in Gibson's position if he should remain at the camp for a substantially longer period and then depart without leave.[*]

The question raised concerning venue has been determined adversely to Gibson's contention by our decision in *United States* v. *Anderson*, 328 U. S. —.

The judgments are reversed and the causes are remanded to the District Courts from which they came, for further proceedings consistent with this opinion.

MR. JUSTICE MURPHY joins in the opinion of the Court for the reasons stated therein and for the additional reasons set forth in his dissenting opinion in *Falbo* v. *United States*, 320 U. S. 549, 555, and in his concurring opinion in *Estep* v. *United States*, 327 U. S. 114, 125.

[*] See note 30.

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[30] See note 30.